THE

HEDAYA, OR GUIDE;

COMMENTARY

ON THE

MUSSULMAN LAWS:

TRANSLATED BY ORDER OF THE

GOVERNOR-GENERAL AND COUNCIL

OF

BENGAL,

BY

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TRANSLATION

OF THE

HEDÀYA;

COMMENTARY

ON THE

MUSSULMAN LAWS.

BOOK VII.

Of *HOODO͡OD*, or *PUNISHMENTS*.*

Definition of

HOODO͡OD is the plural of *Hidd*; and *Hidd* in its primitive ſenſe ſignifies obſtruction; whence a porter or gatekeeper is termed the *Hiddád*, or obſtructor, from his office of prohibting people from entering. In law it expreſſes the correction appointed and ſpecified by the law on account of the right of God, and hence the extenſion of the term *Hidd* to retaliation is not approved, ſince retaliation is due as a right of *man*, and not as a right of *God*; and in the ſame manner, the extenſion of it to *Tazeer* (or diſcretionary chaſtiſement) is not approved, as *Tazeer* is a ſpecies of correction not ſpecified or determined by any fixed rules of law, but committed to the diſcretion of the *Kâzee*. The original deſign in the inſtitution of *Hidd* is *determent*, that is, warning people from the commiſſion of offenſive actions: and the *abſolution* of the perſon puniſhed is not the original deſign of it, as is evident from its being awarded to *infidels* in the ſame manner as to *Muſſulmans*.

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* Theſe are here confined ſolely to *whoredom*, *drunkenneſs*, and *ſlander*. The puniſhments for *theft*, &c. are treated of under their proper heads.

Chap. I. Of *Zinna*, or Whoredom[*].
Chap. II. Of the carnal Conjunction which occaſions Puniſhment, and of that which does *not* occaſion it.
Chap. III. Of Evidence in Adultery and of Retraction therefrom.
Chap. IV. Of *Hidd-Shirrub*, or the Puniſhment for drinking Wine.
Chap. V. Of *Hidd-Kazaf*, or the Puniſhment for Slander.
Chap. VI. Of *Tazeer*, or Chaſtiſement.

CHAP. I.

Of *Zinna*, or Whoredom.

Whoredom may be eſtabliſhed by *proof*, or by *confeſſion*.

WHOREDOM is eſtabliſhed before the *Kâzee*, in two different modes,—by *Proof*, and by *Confeſſion*;—by *proof*, becauſe that is a demonſtration founded on the appearance of facts;—and by *confeſſion*, becauſe probability is moſt in favour of the truth in ſuch acknowledgement, eſpecially, where it is to be the occaſion of ſuffering and ſhame to the perſon confeſſing;—and whoredom being an act the nature of which moſt frequently excludes the poſſibility of *poſitive* proof, it is neceſſary that *circumſtantial* evidence be admitted as ſufficient to eſtabliſh it, leſt the door of correction might be ſhut.

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[*] Meaning either *adultery* or *fornication*.

To eſtabliſh it upon *proof* four witneſſes are required,

THE manner of giving evidence to whoredom is, by four perſons bearing witneſs againſt a man and a woman that they have committed whoredom together, becauſe GOD has commanded in the *Koran*, ſaying, “ PRODUCE FOUR WITNESSES FROM AMONG YOU AGAINST THEM;” and alſo, “ IF ANY PERSON ADVANCE A CHARGE OF WHOREDOM “ AGAINST OTHERS OF CHASTE REPUTE, AND CANNOT PRODUCE “ FOUR WITNESSES IN SUPPORT OF HIS ACCUSATION, LET HIM BE “ PUNISHED WITH EIGHTY STRIPES:” moreover, the prophet once ſaid to a man who brought before him an accuſation againſt his own wife, “ *Bring four men who may bear teſtimony to the truth of your* “ *allegation:*” and this degree of proof is alſo required, becauſe it is laudable to conceal and cover infirmity, and the contrary is prohibited; and by requiring no fewer than four witneſſes to a charge of whoredom both theſe ends are obtained.

who muſt be particularly examined in reſ th ſtanc fact.

WHEN witneſſes come forward to bear evidence in a caſe of whoredom, it is neceſſary that the *Kázee* examine them particularly concerning the nature of the offence; that is, that he aſk of each witneſs reſpectively, “ What is whoredom?” and, “ in what manner “ have the parties committed it?” and “ where?” and “ at what “ time,” and “ with whom?”—becauſe the prophet interrogated *Máaz* as to the manner of the fact, and the nature of the offence: and alſo, becauſe examination in all theſe particulars is a neceſſary caution, ſince it is poſſible that the witneſſes, by the term *Zinna*, may mean ſomething not directly amounting to carnal conjunction, (ſuch as *ſeeing* and *touching*,) *Zinna* being a phraſe occaſionally applied to theſe alſo:—it is poſſible, moreover, that the whoredom may have been committed in a *foreign* country, and therefore that it is not cognizable; or it may have been committed at a diſtant period, prior to the charge, which is therefore inadmiſſible; it may happen too, that the fact may have been committed under an erroneous conception of the parties with reſpect to its legality, ſuch as would occaſion remiſſion of puniſhment, and ſuch as neither the parties themſelves, nor the evidences againſt them are aware of, (as in a caſe where a man has connexion with the female ſlave of his *ſon*); it is therefore requiſite that the judge examine the evidence minutely with reſpect to all theſe particulars, ſince ſome circumſtance may appear, in the courſe of ſuch inveſtigation, ſufficient to exempt from puniſhment.

Upon the evidence being duly given, —— paſſed.

AND when the witneſſes ſhall thus have borne teſtimony completely, declaring that "they have ſeen the parties in the *very act* of carnal conjunction" (deſcribing the ſame), and the integrity of ſuch evidence is alſo known to the *Kâzee* from both an open and a ſecret purgation, let him then paſs ſentence of *puniſhment for whoredom*, according to ſuch evidence. The *apparent* probity of the witneſſes does not ſuffice in the preſent caſe, but it is neceſſary that the magiſtrate aſcertain their probity, both by an open and a ſecret purgation, in ſuch a manner, that (poſſibly) ſome circumſtance may appear ſufficient to prevent the puniſhment, becauſe the prophet has ſaid "*Seek a pretext to prevent puniſhment according to your ability*:" contrary to all other caſes, in which the *apparent* integrity of the witneſſes is (according to *Haneefa*) held ſufficient. The mode of *open* and *ſecret* purgation is fully ſet forth under the head of *Evidence*.

MOHAMMED has ſaid, in the *Mabſoot*, that the *Kâzee* may imprison the accuſed, until he make a purgation of the witneſſes, becauſe the perſon againſt whom the teſtimony is given ſtands charged with whoredom upon the evidence of witneſſes; and alſo, becauſe the prophet once ordered a perſon charged with whoredom to be impriſoned: contrary to a caſe of *debt*, ſince a debtor cannot be impriſoned upon a charge of debt exhibited againſt him by witneſſes, until their probity be fully proved. The nature of this diſtinction ſhall be treated of at large in another place.

muſt be repeated four different times.

THE confeſſion which eſtabliſhes whoredom is made by a perſon of ſound mind and mature age acknowledging himſelf (or herſelf) guilty of whoredom four times, at four different appearances, in the preſence of the *Kâzee*, he [the *Kâzee*] declining to receive the confeſſion, and ſending the perſon away the firſt, ſecond, and third time. The maturity and ſanity of the perſon confeſſing are conditions, becauſe the declaration of an infant or an idiot is not worthy of any credit, or becauſe the acknowledgment of ſuch is not ſufficient to induce a ſentence of puniſhment. The condition of the confeſſion being made four times at four different appearances is agreeable to our doctors. According to *Shafeï*, a ſingle confeſſion, in a caſe of whoredom, is ſufficient, becauſe he conſiders the law to be the ſame here as in all other caſes, the confeſſion or acknowledgment of any circumſtance being the means of diſcloſing or diſcovering that which is ſo confeſſed or acknowledged; and a ſingle confeſſion is fully adequate to this purpoſe, a repetition being of no manner of uſe, ſince the diſcloſure or diſcovery is not in any degree increaſed or amplified by it: contrary to plurality of witneſſes, as the abundance of witneſſes is a means of removing all doubt with reſpect to their veracity, and of affording fuller ſatisfaction to the mind; whereas, by the repetition of the declaration of *a ſingle perſon*, (as in caſe of *confeſſion*,) no ſuch additional ſatisfaction is obtained. The arguments of our doctors in oppoſition to what is here advanced by *Shafeï* are twofold: FIRST, The caſe of *Mâaz*, on whom the prophet would not decree any puniſhment until he ſhould have made confeſſion of his offence four different times at four different appearances, where it is to be concluded that if a ſingle confeſſion had ſufficed, and it had been proper to proceed to puniſhment upon the force of it alone, the prophet would not have delayed to inflict it until the confeſſion ſhould be four times repeated as above;—SECONDLY, as in evidence to whoredom four witneſſes are requiſite, ſo alſo in the confeſſion thereof four repetitions are requiſite, and for the ſame reaſon, namely, that it is laudable to conceal infirmity; and this condition of the *repetition* of confeſſion has a tendency to conceal infirmity. The reaſons for eſtabliſhing four appearances of the perſon confeſſing as a condition are twofold;—FIRST, the tradition of *Mâaz*, as already related;—SECONDLY, a plurality of *confeſſions* is made a condition, and that cannot be obtained without a plurality of *appearances* on the part of the confeſſor, ſince one effect of an unity of place or appearance is to render the ſeparate declaration of the ſame thing as *one* declaration; and hence four confeſſions, in a ſingle appearance [*], amount only to a ſingle confeſſion; and as confeſſion relates only to the perſon *confeſſing*, the unity, or otherwiſe, of his *appearance*, is regarded, and not that of the *Kâzee*'s aſſembly: and this appearance is made four ſeparate times, by the *Kâzee* repelling the perſon's firſt confeſſion, and ſaying to him "Thou art mad!" and ſuch other words, the perſon, upon the *Kâzee* thus repelling his confeſſion, going forth, ſo as to be out of the *Kazee*'s ſight, and returning again, and repeating his confeſſion;—and ſo on to the fourth time. This is recorded from *Aboo Haneefa*, on the authority of the conduct of the prophet in the inſtance of *Mâaz*, whom he thus ſent out of his ſight three different times.

The term *Majlis*, which, for the ſake of perſpicuity, is in this place tranſlated *appear-* literally ſignifies a *ſeat* or *place of ſitting*; and it may admit of various explanations, according to the circumſtance under which it is applied, or the perſon to whom it relates. When it is mentioned as the *Majlis* of the *Kâzee*, it means the *public aſſembly* or *court* of that magiſtrate: when it applies ſolely to the parties who come to make any declaration before the *Kâzee*, it may be rendered *the appearance of that party in* COURT. It alſo frequently refers to a *private company*, and ſometimes merely to the *poſture* of the party (as in the caſe of divorce left at the option of the wife.) In ſhort, to define the true and preciſe application of the term *Majlis* in the preſent caſe regard muſt be had to the *Muſſulman* uſages, it being cuſtomary for the *Kâzee* to admit people to deliver the ſubſtance of their teſtimony in a *ſitting* poſture, and hence every time the party ariſes and again reſumes his ſeat may be rendered *a new appearance of that party in court.*

The perſon confeſſing muſt be par-
ticularly exa-

When confeſſion ſhall have been made in this manner four different times, the *Kâzee* muſt then proceed to examine the perſon ſo confeſſing, aſking him "What is whoredom?—and, "*where*, and " in *what manner*, and with *whom*—have you committed this whoredom?"—All which duly obſerved, the perſon confeſſing becomes then properly obnoxious to puniſhment, as the proof is complete. The advantages attending the examination of the confeſſing perſon have been already explained under the head of witneſſes bearing evidence to whoredom: but it is to be obſerved that although it be directed there that the *Kâzee* examine the witneſſes with reſpect to the *time* of the perpetration of the fact, yet it is not requiſite to put a ſimilar queſtion to a perſon who *confeſſes*, becauſe that delay which would impeach the credibility of a *witneſs* does not in any reſpect impugn the credibility of a perſon who makes a voluntary confeſſion: ſome, however, have ſaid that if the *Kâzee* interrogate ſuch a perſon with reſpect to the *time* of the fact, it is lawful, ſince it is poſſible that it may have been committed during *Infancy*.

A perſon

If the perſon confeſſing ſhould deny the fact, and retract from his confeſſion, either before or during the infliction of puniſhment, his retractation muſt be credited, and he muſt forthwith be releaſed.—*Shafeï* and *Ibn Lailee* have ſaid that retractation after confeſſion is not to be credited, but that the puniſhment muſt be inflicted, ſince as it has been already incurred by the confeſſion, it cannot be done away in conſequence of denial; as in a caſe where whoredom is eſtabliſhed againſt a perſon upon the teſtimony of witneſſes;—or as in a caſe of retaliation, or of puniſhment for ſlander;—that is to ſay, when retaliation or puniſhment for ſlander are once eſtabliſhed upon the confeſſion of the offender, they do not drop in conſequence of his ſubſequent denial of the fact; and ſo in this caſe likewiſe. The argument of our doctors is that denial after confeſſion is an *intimation*, which (like the confeſſion) may be either *falſe* or *true*; and there is no perſon to diſprove ſuch denial; and hence, from the inconſiſtency between the confeſſion and the denial, a doubt ariſes concerning the confeſſion; and puniſhment drops in conſequence of any doubt: contrary to intimations which involve the rights of individuals, (ſuch as retaliation, and puniſhment for ſlander,) as the claimant of the right, in thoſe caſes, is the diſprover of the perſon who has confeſſed, when he afterwards denies, which is not the caſe in any matter involving merely a *right of the law*.

It is laudable in the *Kâzee*, or *Imâm*, before whom confeſſion of whoredom may be made, to inſtruct the perſon confeſſing to deny it, by ſaying to him "Perhaps you have only *kiſſed* or *touched* her," becauſe the prophet ſpoke ſo to *Mâaz*;—and Mohammed, in the *Mabſoot*, adds that the judge may alſo examine the confeſſing perſon with reſpect to ſuch circumſtances as, if made to appear, would tend to his entire exculpation, ſuch as, "whether the fact confeſſed may "not have been committed *in marriage*," or "under an erroneous "miſconception of its legality?"

SECTION.

Of the Manner of Puniſhment, and the Infliction thereof.

A *married* perſon convicted of whoredom is to be *ſtoned*.

When a perſon is fully convicted of whoredom, if he be married let him undergo the puniſhment of *Rajim*, that is, lapidation, or ſtoning to death, becauſe the prophet condemned *Mâaz* to be thus ſtoned to death, who was married; and he has alſo declared, "*It is "unlawful to ſpill the blood of a Muſſulman, excepting only for three "cauſes, namely* APOSTACY, WHOREDOM *after marriage, and* MUR"DER"—and in this all the companions likewiſe unite.

Mode of executing lapidation.

IT is neceſſary, when a whoremonger is to be ſtoned to death, that he ſhould be carried to ſome barren place, void of houſes or cultivation; and it is requiſite that the ſtoning be executed,—firſt by the witneſſes, and after them by the *Imâm* or *Kâzee*, and after thoſe by the reſt of the by-ſtanders, becauſe it is ſo recorded from *Alee*, and alſo, becauſe in the circumſtance of the execution being begun by the witneſſes there is a precaution, ſince a perſon may be very bold in delivering his evidence againſt a criminal, but afterwards, when directed himſelf to commence the infliction of that puniſhment which is a conſequence of it, may from compunction retract his teſtimony; thus cauſing the witneſſes to begin the puniſhment may be a means of entirely preventing it. *Shafeï* has ſaid that the witneſſes beginning the puniſhment is not a requiſite, in a caſe of *lapidation*, any more than in a caſe of *ſcourging*. To this our doctors reply that reaſoning upon a caſe of *lapidation* from a caſe of *ſcourging* is ſuppoſing an analogy between things which are eſſentially different, becauſe all perſons are not acquainted with the proper method of inflicting flagellation, and hence, if a witneſs thus ignorant were to attempt it, it might prove fatal to the ſufferer, and he would die where death is not his due: contrary to a caſe of *lapidation*, as that is of a deſtructive nature, and what every perſon is equally capable of executing, wherefore if the witneſſes ſhrink back from the commencement of lapidation, the puniſhment drops, becauſe their reluctance argues their retractation. In the ſame manner puniſhment is remitted when the witneſſes happen to die or to diſappear, as in this caſe the condition, namely, *the commencement of it by the witneſſes*, is defeated. This is when the whoredom is eſtabliſhed upon the teſtimony of witneſſes: but when it is eſtabliſhed upon the confeſſion of the offender, it is then requiſite that the lapidation be executed, firſt by the *Imâm* or the *Kâzee*, and after them by the reſt of the multitude, becauſe it is ſo recorded from *Alee*; moreover, the prophet threw a ſmall ſtone like a bean at *Ghamdeea* who had confeſſed whoredom. What is ſaid upon this ſubject is taken from the *Zâhir-Rawâyet*.

The corpſe of a perſon executed by lapidation for whoredom is entitled to the uſual ablutions, and to all other funeral ceremonies, becauſe of the declaration of the prophet with reſpect to *Mâaz*, "*Do* "*by the body as ye do by thoſe of other believers*;"—and alſo, becauſe the offender thus put to death is ſlain in vindication of the laws of God, wherefore ablution is not refuſed, as in the caſe of one put to death by a ſentence of retaliation: moreover, the prophet allowed the prayers for the dead to *Ghamdeea*, after lapidation.

An unmarried free perſon is to be ſcourged

If the perſon convicted of whoredom be *free*, but *unmarried*, the puniſhment with reſpect to him is *one hundred ſtripes*, according to what is ſaid in the *Koran*, "THE WHORE AND WHOREMONGER SHALL "YE SCOURGE WITH AN HUNDRED STRIPES;"—for although this text be cancelled with reſpect to *married* perſons, yet in regard to all other than thoſe who are married the law muſt be executed in conformity to it.

Mode of executing *ſcourging*.

Observe that the hundred ſtripes inflicted by the decree of the magiſtrate muſt be adminiſtered with a rod which has no knots upon it; and that the ſtripes muſt be applied with *moderation*, that is to ſay, neither with ſeverity, nor yet with too much lenity; becauſe *Alee*, when he was about to inflict correction, uſed to ſmooth off from the rod any knots which might happen to be upon it; and as too much ſeverity on the one hand tends to deſtruction, ſo on the other hand too much *lenity* is inadequate to the deſign of correction. And when puniſhment is to be inflicted, on any perſon, it is neceſſary that he be ſtripped naked; that is to ſay, that all the clothes be taken off, except the girdle;—becauſe *Alee* directed ſo in this matter; and alſo, becauſe the puniſhment is in this way adminiſtered with the greateſt effect: but as the removal of the girdle from the body would expoſe nakedneſs, it is therefore to be left.

The ſtripes muſt not all

It is requiſite that the hundred ſtripes be given, not all upon be given on one part of the body.

the ſame part or member * of the perſon upon whom puniſhment is inflicted, but upon different parts, as it might otherwiſe be attended with danger to life; and none of the ſtripes muſt be inflicted on the *face*, the *head*, or the *privities*, becauſe the prophet once ſaid to an executioner, "*In inflicting the puniſhment take care not to ſtrike the* "FACE, *the* HEAD, *or the* PRIVITIES;" and alſo, becauſe the firſt of thoſe is the ſeat of expreſſion and likewiſe of beauty; and the ſecond is the central ſeat of the ſenſes; and the third is a part which cannot be wounded without danger to life; and it is to be apprehended that in the firſt and ſecond inſtance the appearance and the faculties might ſuſtain material injury, and the injuring of thoſe is a ſpecies of deſtruction to the man; and that in the laſt *life* might be endangered: it is unlawful therefore to ſtrike on any of thoſe parts, the deſign of correction being *amendment* and not *deſtruction*. *Aboo Yooſaf* has ſaid that one or two ſtrokes may be given on the head, as *Aboo Bikr* once ſaid to an executioner, "*Strike on the head, becauſe there the* "*devil reſides:*" in reply to this, however, we remark that *Aboo Bikr* gave this direction with reſpect to an infidel alien, who had been uſed to ſeduce believers from the faith, and whoſe life of courſe had been forfeited.

Scourging muſt be inflicted upon a

WHEN a man is to be ſcourged for whoredom he is to receive his puniſhment in a ſtanding poſture, becauſe *Alee* has ſaid, "*Correction* "*is to be inflicted upon men ſtanding, and upon women ſitting*;" and alſo, becauſe the proper infliction of puniſhment depends upon it's being *open* and *publick*, which is beſt effected by its being received in a ſtanding poſture; but yet as a woman is nakedneſs †, in thus adminiſtering the correction to *her* there might be an apprehenſion of the expoſure of nakedneſs. It is to be obſerved that in adminiſtering puniſhment

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* In the original, *Azoo*, a limb, which would make this ſpecies of correction more properly to apply to the *baſtinado*.

† "*A woman is nakedneſs*;" that is to ſay, every part of a woman's perſon is equally indecent to be ſeen.

niſhment it muſt not be inflicted in the way of *Mid**. Concerning the meaning of the term *Mid* there are various opinions:—ſome ſay that it ſignifies laying a perſon on his face upon the ground, and ſtretching out his limbs;—ſome, that it ſignifies the executioner drawing the rod over his own head; others, that it ſignifies the executioner drawing back the rod, after giving the blow; but the correction muſt not be inflicted in the way of *Mid*, according to any of theſe acceptations, as it is more than what is due.

A *ſlave* to receive *fifty* ſtripes.

If the perſon convicted of whoredom be a *ſlave*, male or female, the puniſhment of ſuch is fifty ſtripes, becauſe the Almighty has ſaid [in the *Koran*] ſpeaking of female ſlaves "THEY SHALL BE SUBJECT TO HALF THE PUNISHMENT OF FREE MARRIED PEOPLE;"—and the term *ſlave* in the text extends to *males* as well as to *females*. Moreover, as bondage occaſions the participation of only half the *bleſſings* of life, it alſo occaſions the ſuffering of only half the *puniſhments*, becauſe an offence increaſes in magnitude in proportion to the magnitude of bleſſings under the enjoyment of which it is committed.

A woman is not to be *ſtripped*.

The puniſhment of whoredom is the ſame with reſpect to both ſexes, as all the texts which occur in the ſacred writings upon this ſubject extend equally to both; but yet a woman is not to be ſtripped, neither is her veil to be taken off, but only her *robe*, or other outward garment, as the removal of any other part of her dreſs would be offenſive to modeſty; but as the robe or outward garment would prevent the effect of the correction, and the removal of ſuch is not indecent, ſhe is to be ſtripped of theſe.

A WOMAN is to receive her puniſhment in a *ſitting* poſture, according to the direction of *Alee* before recited, and alſo, becauſe in this a regard is ſhewn to decency, which it is incumbent to preſerve; and for the ſame reaſon, where a woman is to be ſtoned, a hole or excavation ſhould be dug to receive her, as deep as her waiſt, becauſe the prophet ordered ſuch a hole to be dug for *Ghamdeea* before-mentioned, and *Alee* alſo ordered a hole to be dug for *Shooráha Hamdeeánee:* it is however immaterial whether a hole be dug or not, becauſe the prophet did not iſſue any particular ordinance reſpecting this; and the nakedneſs of a woman is ſufficiently covered by her garments; but yet it is *laudable* to dig a hole for her, as decency is thus moſt effectually preſerved. There is no manner of neceſſity to dig a hole for a *man*, becauſe the prophet did not ſo, in the caſe of *Máaz.* And obſerve it is not lawful to *bind* a perſon in order to execute puniſhment upon him in this caſe, unleſs it appear that it cannot otherwiſe be

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* Literally *length*; it admits of various applications.

Slaves cannot be puniſhed for whoredom but by authority.

A MASTER cannot inflict correction upon his *male* or *female* ſlave [for whoredom] but by permiſſion of the *Kâzee*.—*Shafeï* has ſaid that it belongs to a maſter to inflict correction upon his ſlave, in this as well as in any other caſe, becauſe a man's authority over his ſlaves is *general* and *abſolute*, even preferably to that of the *Kâzee*, as a maſter is empowered to perform acts with reſpect to his ſlaves in which the *Kâzee* is not empowered; this, therefore, is the ſame as *Tazeer*, or diſcretionary correction; that is to ſay, the maſter is at liberty to inflict ſtated puniſhment for whoredom upon his ſlaves in the ſame manner as diſcretionary correction. The arguments of our doctors are twofold;—FIRST, the prophet has declared that there are four things committed to magiſtrates, and that one of thoſe is *Hidd*, or ſtated puniſhment, which is here treated of;—SECONDLY, *Hidd*, or ſtated puniſhment, is a right of GOD, as the deſign of it is to purify the world from ſin; and as it is a right of GOD, hence it cannot be done away by the act of any individual, wherefore this right is to be exacted by the prince, as the deputy of the law, or by the *Kâzee*, as the deputy of the prince: contrary to *Tazeer*, or diſcretionary correction,

rection, becauſe that is a right of the individual, whence it is that infants are ſubject to *Tazeer*, although they be not liable to *Hidd.*

Definition of the ſtate of marriage to lapidation.

The ſtate of marriage neceſſary to induce lapidation, requires that the whoremonger be of ſound underſtanding and mature age, and a *Muſſulman*, free, and who has conſummated in a lawful marriage with a woman at a time when ſhe alſo is ſane, free, adult, and a *Muſſlima*. This is the definition of *Haneefa* and *Aboo Yooſaf*. According to *Mohammed* and *Shafeï* the ſtate of marriage in queſtion requires ſimply that the whoremonger be *free*, and a *Muſſulman*, and one who has conſummated in a lawful marriage with a woman of the ſame deſcription. It is to be conſidered, however, that ſanity of intellect and maturity of age are conditional to the receiving of puniſhment, ſince without theſe men are incapable of reading or underſtanding the ordinances of the law: and the other requiſites, beſides theſe two, are made conditions in order that the ſin may appear in its greateſt magnitude, from the conſideration of the magnitude of thoſe bleſſings under which it is committed, as ingratitude for the bleſſings of Providence is greateſt, and moſt atrocious, when thoſe bleſſings are enjoyed in the higheſt degree; now the particulars aforeſaid, namely, the *Muſſulman* faith, and freedom, and the enjoyment of a woman in a lawful marriage, are among the greateſt bleſſings of life, wherefore lapidation on account of whoredom is ordained in caſes where all theſe circumſtances exiſt; and hence lapidation is enjoined when theſe conditions exiſt: contrary to the ſuperiority derived from the other gifts of nature or of fortune, ſuch as *family*, *learning*, *capacity*, *beauty*, and *wealth*, which are not conditions, becauſe the law has no regard to thoſe circumſtances, and alſo, becauſe thoſe which have been ſtated are alone ſufficient to conſtitute the magnitude of the ſin of whoredom, ſo as to ſubject the offender to lapidation, ſince, by virtue of *freedom* a man is enabled to contract himſelf in a lawful marriage, and by virtue of a lawful marriage he is enabled lawfully to indulge his carnal appetite, and by ſuch indulgence to allay his paſſions; and by virtue of being a *Muſſulman*, he is enabled to marry a *Muſſlima*, which fixes and confirms the belief of the prohibition of whoredom to him; all theſe things, therefore, particularly forbid and inhibit a man from the commiſſion of whoredom; and a ſin is great in proportion to the force of the inhibitions under which it is committed.—The ſect of *Shafeï* differ from our doctors with reſpect to that part of the propoſition which aſſerts that the profeſſion of the *Muſſulman* faith is a requiſite condition: and there is alſo a record from *Aboo Yooſaf* to the ſame effect. Their argument is, that in the time of the prophet a *Jew* committed whoredom with a *Jeweſs*, and the prophet ordered them both to be ſtoned:—but to this our doctors reply that the prophet paſſed that ſentence in conformity to the *Tawreet*, or *Jewiſh* law, which has ſince been ſuperſeded by the *Muſſulman* law; and the declaration of the prophet, "*Whoſoever is not a true believer* "*ſhall not be regarded as married*[*]," is a confirmation of this. The conſummation now mentioned as a condition is underſtood in the conjunction having taken place ſo far as to require the preſcribed ablutions; and as it is a condition eſſential to ſuch a marriage as induces lapidation, that the *woman*, at the time of conſummation, be of the ſame deſcription with the *man*, in the points of *ſanity*, *maturity*, *freedom*, and profeſſion of the *faith*, it follows that if a man were to conſummate with a wife who is an *idiot*, an *infant*, a *ſlave*, or an *infidel*, he is not conſidered as married in this ſenſe, ſince on account of theſe circumſtances the advantages of the matrimonial enjoyment are incomplete; becauſe a man has a natural averſion to conſummate with a *lunatick* woman; and he can have but little gratification with one under age, where deſire is not reciprocal; and in the ſame manner, he has not a ſtrong deſire to conſummate with a *ſlave*, as in that caſe his children are *ſlave-born*; and ſo alſo, the enjoyment of a wife who is an *infidel* affords the leſs ſatisfaction, becauſe of the difference of religious principles; in all theſe caſes, therefore, the advantage of the carnal enjoyment is defective, whence the huſband of ſuch woman does not, by conſummation, become a *Mahſan*, or married man, in that ſenſe which induces lapidation.—And the rule is the ſame where the huſband is an *idiot*, an *infant*, a *ſlave*, or an *infidel*, and his wife *ſane*, *adult*, and a *Muſſlima*.—*Aboo Yooſaf* has ſaid that where the wife is an infidel, her huſband, being a *Muſſulman*, by conſummating his marriage with her, becomes as a *married man*; but in reply to this, beſides what has been above advanced, it is to be remarked that the prophet has declared, "*A* MUSSULMAN *is not rendered a married man by connexion with a* CHRISTIAN, *nor is a* FREEMAN *rendered married by connexion with a wife who is a* SLAVE; *nor a* SLAVE *by connexion with a wife who is* FREE."

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[*] Arab. *Mahſan*; that is, married, under the circumſtances requiſite to induce lapidation.

and *ſcourging* cannot be united;

IT is not lawful to unite the puniſhments of *ſtoning* and *ſcourging* in the ſame perſon, becauſe the prophet has left no precedent of the kind; and alſo, becauſe if they were to be united, the *ſcourging* would be uſeleſs, ſince the deſign of correction is a warning from vice, and this warning is effected by *lapidation* in reſpect only to *others* than the perſon ſo puniſhed; for a warning cannot be effected, with reſpect to *the perſon puniſhed*, after his deſtruction.

nor (with reſpect to a *woman*) *ſcourging* and *baniſhment*.

IF a woman guilty of whoredom be of mature age, in her puniſhment *ſcourging* and *baniſhment* cannot be united. According to *Shafeï* theſe two may be united with reſpect to her by way of puniſhment,—that is baniſhment may alſo be included in her puniſhment,—becauſe the prophet has declared "*If a man, being unmarried, commit whoredom with a woman who is of age, the puniſhment of ſuch is one hundred ſtripes; and he ſhall be excluded from the city for the ſpace of one year, as by his baniſhment the door is ſhut againſt whoredom, becauſe in an unſettled ſituation a man meets with few female companions to tempt him to commit it.*" The arguments of our doctors are twofold;—FIRST, GOD has declared "THE WHORE AND THE

"WHOREMONGER SHALL YE SCOURGE WITH AN HUNDRED "STRIPES," from which it is evident that the ſole puniſhment of ſuch is one hundred ſtripes, for if it were more, it would be there mentioned, and one hundred ſtripes alone would not have been declared ſufficient:—SECONDLY, her baniſhment is opening the way to the further commiſſion of her crime, becauſe people are under leſs reſtraint when removed from the eye of their friends and relations, as thoſe are the perſons whoſe cenſures they are moſt in dread of: moreover, in an unſettled ſituation, and among ſtrangers, the neceſſaries of life are with difficulty procured, whence ſhe might be induced voluntarily to proſtitute herſelf for a ſupply, which of all kinds of whoredom is the moſt abominable; and the ſaying of *Alee* that "Baniſh-"ment is a means of ſeduction," is founded on this ſecond reaſon.—As to the ſaying of the prophet quoted by *Shafeï*, it is ſuperſeded, as well as the remainder of that ſaying, "*If a* SIYEEB (meaning a man "who has conſummated a marriage) *afterwards commit adultery with* "*a* SIYEEBA, *their puniſhment is one hundred ſtripes and lapidation*:"—the way in which this is ſuperſeded is explained in its proper place. In ſhort, baniſhment, with reſpect to a looſe woman, in the way of *puniſhment*, is not lawful: but yet if the magiſtrate ſhould find it adviſeable, he may baniſh her for the ſpace of *one year*, or leſs, but this baniſhment is in the way of *Tazeer* or *diſcretionary correction*, as baniſhment may in ſome caſes operate as a warning, wherefore it is committed to the *Kázee* or the *Imám*; and what is recorded concerning the companions, of their having *baniſhed* people, is to be regarded in the way of *Tazeer*.

The execution of *ſtoning* is not ſuſpended on ac-

IF a *ſick* perſon, being one whoſe proper puniſhment is *lapidation*, commit whoredom, he is to be ſtoned, becauſe his deſtruction is due, and is therefore not to be ſuſpended on account of his illneſs; but if he be one whoſe puniſhment is *ſcourging*, the execution of it muſt be deferred until his recovery, leſt life ſhould be endangered, for the ſame reaſon as the limb of a ſick thief is not cut off until he be in a proper habit of body to endure the amputation without riſk of life.

but it is ſo on account of *pregnancy*.

If a pregnant woman commit whoredom, and her puniſhment be *lapidation*, the execution muſt be delayed until her delivery, for if ſhe were to be ſtoned whilſt pregnant, the child would be deſtroyed in her womb, and its blood is not to be taken; and if her puniſhment be *ſcourging*, the execution muſt be deferred until ſhe ſhall have recovered from her labour, as that is a ſpecies of ſickneſs, wherefore a delay muſt be made until her health be perfectly reſtored: contrary to a caſe of *ſtoning*, where the puniſhment need *not* be delayed until a perfect recovery, ſince the delay in this caſe is only with a view to the preſervation of the child in her womb, which is ſeparated from her upon the inſtant of its birth. It is recorded from *Haneefa* that in *ſtoning* alſo the execution muſt be delayed until the child become independent of her care, in caſe there ſhould be no other perſon to foſter it in her ſtead, becauſe by this delay the child is preſerved from deſtruction; and it is moreover related that when *Ghamdeea*, after her delivery, came before the prophet, that he might execute puniſhment upon her, he ſaid to her "*Go and remain until ſuch time as your child* "*is independent of you.*"—And observe,—If a pregnant woman be convicted of whoredom *upon evidence* ſhe muſt be confined in priſon until ſhe be delivered, leſt ſhe ſhould abſcond; contrary to a caſe where a pregnant woman is convicted upon her own confeſſion; for in this caſe ſhe is not to be confined, as her denial after confeſſion muſt be credited, (for which reaſon puniſhment is remitted in caſe of her denial,) wherefore to *impriſon* her would be uſeleſs.

A pregnant woman, convicted upon *evidence*, muſt be impriſoned.

CHAP. II.

Of the *Carnal Conjunction* which occaſions *Puniſhment*, and of that which does *not* occaſion it.

n of the term *Zinna*.

The carnal conjunction which occaſions puniſhment is *Zinna*, or *whoredom*; and this, both in its primitive ſenſe, and alſo in its legal acceptation, ſignifies the carnal conjunction of a man with a woman who is not his property, either by right of marriage or of bondage, and in whom he has no *erroneous* property, becauſe *Zinna* is the denomination of *an unlawful conjunction of the ſexes*, and this illegality is univerſally underſtood where ſuch conjunction takes place devoid of proprety, either *actual* or *erroneouſly ſuppoſed.* What is here ſaid is the definition of whoredom with reſpect to a *man*:—as to the whoredom of a *woman*, it ſimply ſignifies her admitting the man to commit the fact.

Definition of *erroneous* carnal conjunction.

ERROR in carnal conjunction is of two kinds,—the *firſt*, error in reſpect to the *act*, which is termed *Shoobba-Iſhtibâh*, or *error of miſconception*; the *ſecond*, error in reſpect to the *ſubject*, which is termed *Shoobba-Hookmee*, [error by effect,] or *Shaba-Milk* [erroneous propriety.]—The firſt of theſe diſtinctions of error is not eſtabliſhed, nor underſtood, but with reſpect to a man who miſtakes an *illegal* carnal conjunction for *legal*, becauſe *Iſhtibâh* ſignifies the man having carnal intercourſe with a woman, under the ſuppoſition of the ſame being lawful to him, in conſequence of his ſuppoſing ſomething other than that which is neceſſary to conſtitute legality as affording an argument of ſuch legality; it is therefore neceſſary that this miſtake ſhould have operated in his mind in order to eſtabliſh *Iſhtibâh*, or miſconception; and hence this ſpecies of error is not underſtood, except in the caſe of a perſon who is under ſuch miſapprehenſion.—The *ſecond* ſpecies of error is eſtabliſhed, where the argument of the legality of carnal conjunction exiſts in itſelf, but yet practice cannot take place upon it, becauſe of ſome obſtacle; and this does not depend upon the apprehenſion or belief of the perſon who commits the unlawful act; whence this ſpecies of error is regarded in reſpect to *all* men, that is to ſay, men who ſo conceive, and alſo thoſe who do not.—And puniſhment drops in conſequence of the exiſtence of either of theſe two ſpecies of error, on account of a well-known tradition.

Parentage is eſtabliſhed in a caſe of error with reſpect to the *ſubject*, but not in a caſe of error with reſpect to the *act*:

In a caſe of error of the *ſecond* ſpecies, the parentage of the child is eſtabliſhed in the man who has had ſuch connexion, if he claim ſuch child; but in a caſe of error of the *firſt* ſpecies, the parentage of the child is not to be eſtabliſhed in the man, notwithſtanding his claim,—becauſe, in a caſe where the error is of the *firſt* ſpecies the act of generation is *poſitive whoredom*, although puniſhment be not incurred, on account of a circumſtance which has reference to the man committing ſuch act, (namely, that of the illegality of the act being miſconceived by him, according to his apprehenſion of it;) but the act of generation, in a caſe of error of the *ſecond* ſpecies, is not *poſitive whoredom*.

Error in reſpect to the *act* exiſts in eight ſeveral ſituations; namely, with—

I. the female ſlave of a man's *mother*;—

II. the female ſlave of his *father*; —

III. the female ſlave of his *wife*;—

IV. a wife repudiated by three divorces, who is in her *Edit*;—

V. a wife completely divorced for a compenſation, and in her *Edit*;

VI. an *Am-Walid*, who is in her *Edit* after emancipation with reſpect to her maſter;

VII. the female ſlave of a maſter, with reſpect to his male ſlave;

VIII. a female ſlave, delivered as a pledge, with reſpect to the receiver of ſuch pledge, (according to the *Rawâyet-Saheeh* in treating of puniſhment;)—and it is to be obſerved, that a *borrower*, in this point, ſtands in the ſame predicament with the *receiver of a pledge*:—

and there is no puniſh-

—and in all thoſe ſituations the perſon who has carnal conjunction does not incur puniſhment, provided he declare—" I conceived that "this woman was lawful to me;"—but if he ſhould acknowledge his conſciouſneſs that the woman was *unlawful* to him, he incurs puniſhment.

ment in either caſe.

ERROR in reſpect to the *ſubject* exiſts in ſix ſituations; namely, with—

I. the female ſlave of a man's ſon;

II. a wife completely repudiated by an implied divorce;

III. a female ſlave ſold, with reſpect to the ſeller, before the delivery of her to the purchaſer;

IV. a female ſlave *Mamboora*,—(that is, a ſlave ſtipulated to be given *in dower* to a wife,)—with reſpect to the huſband, before ſeizin of her being made by the wife;

V. a female ſlave held in partnerſhip, with reſpect to any of the partners;

VI. a female ſlave delivered in pledge, with reſpect to the receiver of ſuch pledge, according to the Book of Pawnage;

—and in all thoſe ſituations a perſon who has carnal connexion does not incur puniſhment, even though he ſhould confeſs his conſciouſneſs of ſuch woman being unlawful to him.

A contract of marriage prevents puniſhment, although avowedly *illegal*.

ACCORDING to *Haneefa*, a contract of marriage is a ſufficient ground of error, although the illegality of ſuch marriage be univerſally allowed, and the man entering into ſuch contract be ſenſible of this illegality. With our other doctors, on the contrary, a contract of marriage is not admitted as a legal ground of error, if the man be ſenſible of the illegality.—The effect of this difference of opinion appears in a caſe where a man marries a woman related to him within the prohibited degrees,—as ſhall be hereafter explained.

Connexion with a wife

IF a man pronounce three divorces upon his wife, and afterwards have thrice divorced (before the expiration of her *Edit*,) occaſions puniſhment.

have carnal connexion with her during her *Edit*, and acknowledge his conſciouſneſs of her being unlawful to him, puniſhment is incurred, becauſe here poſſeſſion by *marriage*, which legalizes generation, has been totally annihilated, and hence there can be no error, as the text in the *Koran* ſhews that *legality* is deſtroyed in this caſe; and all the doctors coincide in this opinion. But if he were to declare that "he conceived, or ſuppoſed, ſhe was ſtill lawful to him," puniſhment is not incurred, becauſe his apprehenſion is to be regarded, ſince the effects of marriage ſtill remain, with reſpect to the eſtabliſhment of the parentage of children, and the matrimonial reſtraint, and alimony; (for if the woman ſhould bear a child, at any period within two years from the date of divorce, the parentage of ſuch child is eſtabliſhed in the huſband, and ſhe remains under the reſtraint to which ſhe is ſubject in marriage, and her alimony alſo remains incumbent upon her huſband;) his apprehenſion, as above pleaded, is therefore of force to prevent puniſhment, on account of *error by miſconception.* And an *Am-Walid*, after manumiſſion, and a woman in a ſtate of repudiation by *Khoola*, or one divorced for a compenſation, (who are in their *Edit*,) ſtand in the ſame predicament with a woman repudiated by three divorces, as their illegality is univerſally admitted, and certain effects of marriage continue during their *Edit*, as well as in the caſe of a wife under three divorces.

Connexion with a wife divorced by *implication* does not induce puniſhment;

If a man divorce his wife by *implication*, ſaying, "You are "*diveſted*," or "you are *at your own diſpoſal*," and ſhe chuſe divorce,—and he afterwards have carnal knowledge of her within the term of her *Edit*, and ſhould acknowledge that he knows her to be unlawful to him, yet puniſhment is not incurred; becauſe concerning this caſe there is a difference among the companions; for *Omar* holds that the forms above-mentioned are effective of only a ſingle divorce reverſible; and the ſame in all expreſſions of divorce by implication: he alſo holds the rule to be the ſame, where the huſband intends *three* divorces, as he maintains that here likewiſe a ſingle divorce reverſible only takes place, and that the intention of three divorces is not regarded.

nor that with the female ſlave of a *ſon*

PUNISHMENT is not incurred by a man having carnal connexion with the female ſlave of his *ſon*, or of his *grandſon*, although he ſhould acknowledge his conſciouſneſs of ſuch female ſlave being unlawful to him, for in this caſe the error is *by effect*, ſince it proceeds from an argument founded upon the words of the prophet, who ſaid to one with whom he was converſing, "THOU *and* THINE *are thy* FATHER's;"—and the *grandfather* is ſubject to the ſame rule with the *father*, as he is alſo a *parent*. The parentage alſo of the child begotten in ſuch carnal conjunction is eſtabliſhed in the father aforeſaid, who remains reſponſible to his ſon for the value of the female ſlave.

miſconception is pleaded.)

IF a perſon have carnal connexion with the female ſlave of his *father*, or his *mother*, or his *wife*, and plead his conception that ſuch ſlave was lawful to him, he does not incur puniſhment; neither is his accuſer liable to puniſhment:—(but if he ſhould acknowledge his conſciouſneſs of the illegality, puniſhment is to be inflicted upon him,—and the ſame rule obtains where a ſlave has connexion with the bondmaid of his maſter,) becauſe between theſe there is a community of intereſts in the acquiſition of profit; and hence the man who commits the act may in thoſe caſes have conceived, with reſpect to the *enjoyment*, that this ſpecies of uſufruct is alſo lawful to him,—wherefore error by miſconception is applicable to him; but nevertheleſs this is *actual whoredom*, for which reaſon puniſhment is not incurred by the *accuſer*. The law is the ſame, (according to the *Zahir Rawáyet*,) if the female ſlave, in either of theſe caſes, were to plead her ſuppoſing that the act was lawful, without any ſuch plea on the part of the man,—becauſe the carnal conjunction of a man and a woman being *one act*, it follows that a plea of ſuppoſed legality, made by *either* party, eſtabliſhes *error* with reſpect to *both*; and hence the puniſhment of both is abrogated.

Puniſhment is incurred by connexion with the ſlave of a *brother*.

If a man have carnal connexion with the bondmaid of his *brother*, or of his *uncle*, he incurs puniſhment, although he ſhould plead that he had conceived her to be lawful to him, becauſe between ſuch relations no community of intereſt exiſts. And the law is the ſame with reſpect to the female ſlaves of all other relations within the prohibited degrees, excepting thoſe who are related to the man within the *parental* degree, (ſuch as his *father* or his *ſon*,) becauſe between him and thoſe prohibited relations no community of intereſt exiſts.

Connexion with a woman married by *miſtake* does not occaſion puniſhment.

If a man engage in a contract of marriage with a woman, and another woman be ſent to him *, the female relations declaring her to be the woman married to him by ſuch contract, and he have carnal communication with that woman, he does not incur any puniſhment; but yet he muſt pay the woman her dower, becauſe *Alee* once paſſed a decree to this effect;—and he alſo ſubjoined, in his decree, that the woman ſhould obſerve an *Edit*:—moreover, the man has proceeded upon *apparent proof*, namely, the information of the woman's female relations, with reſpect to the ſubject of his error, ſince men can have no perſonal knowledge of or acquaintance with their wives prior to the matrimonial engagement; and hence the man in this caſe is the ſame as a perſon acting under a deception. And the accuſer of this perſon does not incur the puniſhment of ſlander, becauſe poſſeſſion by *marriage*, requiſite to legalize generation, is in no reſpect eſtabliſhed. There is an opinion recorded from *Aboo Yooſaf*, that the accuſer is liable to puniſhment, becauſe the carnal conjunction is to all appearance legal, with reſpect to the man, according to the information of the woman's female relations, and of courſe his accuſer becomes liable to puniſhment, as a decree muſt be founded upon what is *apparent*.

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* It is almoſt unneceſſary to remark that, from the nature of the *Muſſulman* cuſtoms, a man can never be ſuppoſed to have ſeen his wife until after marriage,—the woman being utterly excluded from the ſight of all men except her relations *within the prohibited degrees*.

IF a man have carnal connexion with a woman whom he finds in his own bed, puniſhment is incurred by him, becauſe there can be no *error* where he paſſes any length of time in the company of his wife, and thence his apprehenſion of this woman being his wife, from the circumſtance of his finding her in bed, is not regarded, ſo as to prevent puniſhment:—the reaſon of this is that ſometimes a relation of the wife, reſiding in the houſe with her, may ſleep upon her bed. And the law is the ſame where the man is *blind*, becauſe it is always in his power to aſk and diſcover who the woman is; and he may alſo diſcover this by the ſound of her *voice*. But yet if he invite the woman to the act, and ſhe conſent, ſignifying that "ſhe is his "wife,"—and he copulate with her, in this caſe he does not incur puniſhment, as he is deceived by the woman's declaration and behaviour.

Connexion with a woman under an un- [illegible] induce puniſhment.

IF a man marry a woman whom it is not lawful for him to marry, and afterwards have carnal connexion with her, he does not incur puniſhment, according to *Haneefa*; but if he be at the time aware of illegality, he is to be corrected by a *Tazeer*, or *diſcretionary* correction. The two diſciples and *Shafeï* have ſaid that he is liable to puniſhment, when he marries the woman, being aware of the illegality, becauſe, as the contract has not been executed in regard to its proper ſubject, it is of courſe void; for here the woman is not a proper ſubject of marriage, becauſe the proper ſubject of marriage, or of any other deed, is a thing which is a proper ſubject of the *effects* of ſuch deed; now one of the effects of marriage is the legalizing of generation; but as the woman is among thoſe who are prohibited to the man, the contract of marriage with her is conſequently nugatory, in the ſame manner as a contract of marriage between *man* and *man*. The argument of *Haneefa* is that the contract has taken place in regard to its proper ſubject, as the woman is a proper ſubject of marriage, becauſe the proper ſubject of any deed is a thing which admits of the ends intended being obtained from it; now the end of marriage is the procreation of children, and to this every daughter of Adam is competent; the caſe therefore admits of the contract being engaged in with reſpect to all its effects, and of all its effects being obtained from it; but on account of the prohibition in the ſacred text, the legalization of generation is not obtained; and ſuch being the caſe error is occaſioned, as error is a thing which is the *appearance* of a proof, and not the *ſubſtance* of one; and as, in the preſent caſe, the man has perpetrated an offence for which the *ſtated* puniſhment, or *Hidd*, is not appointed, *Tazeer*, or diſcretionary correction, muſt be inflicted.

f laſciviouſneſs are to be corrected by *Tazeer*;

If a man commit any act of laſciviouſneſs with a ſtrange woman ſuch as *Takhfeez* *, he is to be corrected by *Tazeer*, ſince ſuch acts are illegal and forbidden by the word of God: but a ſtated puniſhment is not appointed for them; *Tazeer* muſt therefore be inflicted upon that perſon.

and ſo likewiſe *ſodomy*, committed with a ſtrange woman;

If a man copulate with a ſtrange woman *in ano*,—(that is, commit the act of *ſodomy* with her,) there is no ſtated puniſhment for him, according to *Haneefa*; but he is to be corrected by *Tazeer*. The *Jama Sagheer* directs an aggravation of the *Tazeer* or correction in this caſe, and ſays that the offender muſt be kept in a place of confinement until he declare his repentance. The two diſciples have ſaid that as this act reſembles whoredom, the perſon committing it is ſubject to the ſtated puniſhment for whoredom; and there is one opinion of *Shafeï* to this effect; but another opinion of his is that the parties ſhould be put to death, of whatever deſcription they may be,—that is, whether they be *married* or not,—becauſe the prophet has ſaid "*Slay both the* ACTIVE *and the* PASSIVE," (or, according to another tradition, "*Stone both the* AGENT *and the* SUBJECT.")—The argument of the two diſciples is that the act in queſtion has the property of whoredom, as that is defined to be "an act of luſt com-"mitted in that which is the object of the paſſion, completely, and "under ſuch circumſtances as to be purely unlawful, and where the "deſign is the injection of *Semen*." *Haneefa*, on the other hand, argues that this conjunction is not *actual whoredom*, becauſe the companions of the prophet have diſagreed concerning their decrees upon it, for ſome of them have ſaid that offenders of this kind ſhould be *burnt*, ſome, that they ſhould be *buried alive*, others, that they ſhould be *caſt headlong from ſome high place*, ſuch as the top of a *houſe*, and then be *ſtoned to death*,—and ſo forth: moreover, the conjunction in queſtion has not the property of whoredom, as it is not the means of producing offspring, ſo as (like *whoredom*) to occaſion any default in birth or confuſion in genealogy;—beſides, this ſpecies of carnal intercourſe is of leſs frequent occurrence than *whoredom*, becauſe the deſire for it exiſts only on the part of the *active* and not of the *paſſive*,† whereas in whoredom the deſire exiſts equally on both ſides. As to the tradition cited by *Shafeï*, it probably relates to a caſe where an *extraordinary* and *exemplary* puniſhment is requiſite; or where the perpetrator inculcates and inſiſts upon the lawfulneſs of the act.

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* *Penem fricecus inter femora.*

and

IF a man commit *beſtiality* he does not incur *Hidd*, or ſtated puniſhment, as this act has not the properties of *whoredom*, for whoredom is a heinous offence, as being a complete act of luſt, to which men feel a natural propenſity; but this definition does not apply to copulation with *beaſts*, which is abhorred by an undepraved mind, (whence it is not held incumbent to cover or conceal the genitals of brutes;) and men can have no reaſon for deſiring carnal connexion with *brutes*, but from the moſt vitiated appetite, and the utmoſt depravity of ſentiment:—*Hidd* therefore is not incurred by this perſon; but he is to be puniſhed by a diſcretionary correction, for the reaſons already ſpecified. It is recorded, alſo, that the beaſt ſhould be ſlain and burnt: this, however, is only where the animal is not of an *eatable* ſpecies; but if it be of the eatable ſpecies it is to be *eaten*, (according to *Aboo Haneefa*,) and not *burnt*. *Aboo Yooſaf* holds that it ſhould be conſumed with fire in both caſes, the perpetrator (where it belongs to another perſon) remaining reſponſible to the owner for the value; but yet the burning of it is not *abſolutely incumbent*; nor is it to be burnt for any other reaſon than as, by this means, all recollection of ſo vile a fact may be obliterated, and the perpetrator ſhielded from the diſgrace which would attach to him in caſe of the animal remaining alive.

not incurred by committing whoredom in a foreign country.

If a *Muſſulman* be guilty of whoredom in a foreign country, or in the territory of the rebels, and afterwards return into a *Muſſulman* ſtate, puniſhment is not to be inflicted upon him, on the plea that a man, in embracing the *Muſſulman* faith, binds himſelf to all the obligations thereof, wherever he may be. The arguments of our doctors on this occaſion are twofold;—FIRST, the prophet has ſaid "puniſhment is not to be "inflicted in a foreign land;"—SECONDLY, the deſign of the inſtitution of puniſhment is that it may operate as a prevention or warning; now the *Muſſulman* magiſtrate has no authority in a foreign country, wherefore if puniſhment were inſtituted upon a perſon committing whoredom in a foreign country, yet the inſtitution would be uſeleſs; for the uſe of the inſtitution is that puniſhment may be executed; and as the magiſtrate has no authority in a foreign country, the execution is impoſſible; whence it appears that the commiſſion of whoredom in a foreign country does not occaſion puniſhment there: and if this perſon ſhould afterwards come from the foreign territory into a *Muſſulman* ſtate, puniſhment cannot be executed upon him, becauſe as his whoredom did not occaſion puniſhment at the time of its being committed, it will not *afterwards* occaſion it.

t may be inflicted by the

The perſon to whom the authority of inflicting puniſhment officially appertains, (ſuch as the *Khálif*, for the time being, or the governor) when he carries forth his troops upon an expedition, is at liberty to inflict puniſhment upon any perſon who may be guilty of whoredom within his camp, ſince the perpetrator of the offence is under his immediate authority; but chiefs or commanders of an inferior degree are not at liberty to inflict puniſhment upon perſons guilty of whoredom within their camp, becauſe they are not inveſted with authority to inflict puniſhment*.

Caſe of whoredom committed between infidel ſubjects and

If an alien come into a *Muſſulman* ſtate under a protection, and there commit whoredom with a *Zimmeea*, or female infidel ſubject,—or if a *Zimmee* or *male* infidel ſubject ſo commit whoredom with a female alien, puniſhment is to be inflicted upon the *infidel ſubject*, (according to *Haneefa*) but not upon the *alien*. This alſo is the opinion of *Mohammed* with reſpect to an infidel ſubject, where he is guilty of whoredom with a female alien; but if an alien be guilty of whoredom with a female infidel ſubject, in this caſe he holds that there is no puniſhment for either party. There is alſo an opinion recorded from *Aboo Yooſaf* to this effect; but he afterwards delivered another opinion, that puniſhment is incurred by all the parties concerned, both by the *alien*, and the *female* infidel ſubject,—and alſo by the *male* infidel ſubject, and the *female* alien,—for he argues that an alien under protection, during the time that he continues in a *Muſſulman* territory, ſubjects himſelf to all the ordinances of the temporal law, in the ſame manner as an infidel ſubject does for life, whence it is that puniſhment for ſlander may be inflicted on an alien under protection, and that he may alſo be put to death in retaliation: contrary to puniſhment for drinking wine, as in his belief the uſe of wine is allowable. The argument of *Haneefa* and *Mohammed* is that a protected alien does not come into a *Muſſulman* ſtate as a *reſident*, but is only brought there occaſionally, from ſome particular motive, ſuch as commerce, and the like, and therefore is not to be conſidered as one of the inhabitants of a *Muſſulman* country; (whence it is that he is at liberty to return into the foreign country, and alſo that if a *Muſſulman* or an infidel ſubject, were to murder a protected alien, no retaliation would be exacted of them;) now a protected alien ſubjects himſelf to ſuch of the ordinances of the law only as he himſelf derives an advantage from; and thoſe are all ſuch as reſpect the rights of individuals; for where he is deſirous of obtaining juſtice for himſelf from others, he alſo ſubjects himſelf to juſtice being exacted on him in behalf of others; and *retaliation* * and *puniſhment for ſlander* are among the rights of individuals, but *puniſhment for whoredom* is a right of the *law*. The argument of *Mohammed* is that in whoredom the man is the *principal*, and the woman only the *acceſſary*, according to what was before ſtated; now the prevention of puniſhment in reſpect to the *principal* occaſions the prevention of it in reſpect to the *acceſſary*, but the prevention of puniſhment with reſpect to the *acceſſary* does not occaſion the prevention of it with reſpect to the *principal*; as in a caſe, therefore, where a protected alien commits whoredom with a female infidel ſubject, there is no puniſhment for the alien, ſo neither is there any for the infidel ſubject; but where an infidel ſubject commits whoredom with a female protected alien, puniſhment is to be inflicted on the ſubject, but not upon the alien; and the remiſſion of puniſhment in reſpect to the alien does not occaſion its remiſſion with reſpect to the infidel ſubject, becauſe the woman is only an *acceſſary*.—Correſpondent to this is the caſe of a man committing whoredom with a girl who is an infant, or with a woman who is inſane, where puniſhment is inflicted upon the man, but not upon the infant or the lunatick; whereas, if a woman admit a boy or an idiot to commit whoredom with her, neither of the parties is liable to puniſhment. The argument of *Haneefa* is that the act of the protected alien is *whoredom*, becauſe he is equally with *Muſſulmans* called to the obſervance of certain commands and prohibitions, on account of the torments and chaſtiſements of a future ſtate, (according to the *Moozhab-Saheeh*,) although he be not called to the religious obſervances of the LAW; but the woman's admitting him to commit the fact is the occaſion of puniſhment to her:—contrary to the caſe of the *boy* or the *idiot*, for they are not called, nor under any conſtraint. A difference ſimilar to this obtains in the caſe of a man, who being poſſeſſed, or under the influence of magick, commits adultery with a woman not under ſuch influence; that is to ſay, according to *Haneefa*, puniſhment is inflicted; but according to *Mohammed* it is not inflicted on either of the parties.

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* Meaning *Hidd*, which being a right of the *law*, is a thing of too much importance to be committed to inferior perſons: but every perſon who acts as a commander or magiſtrate is entitled to inflict *Tazeer*, or diſcretionary correction.

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* This is an apparent contradiction, as it is ſaid above that there is no retaliation for the murder of an alien: it is to be conſidered, however, that although a *Muſſulman*, or an infidel ſubject, be not liable to retaliation for the murder of an alien, yet the alien would be ſo for the murder of a *Muſſulman*, or an infidel ſubject.

committed by an infant or an idiot does not induce puniſhment.

IF a boy or an idiot commit whoredom with a woman who is of mature age and ſound judgment, ſhe conſenting thereto, in this caſe there is no puniſhment, neither to the *boy*, to the *idiot*, nor to the *woman*;—*Ziffer* and *Shafeï* maintain that in this caſe the woman incurs puniſhment; and there is alſo one tradition of *Aboo Yooſaf* to the ſame effect. But if a man who is of mature age and ſound judgment commit whoredom with a girl who is an idiot or an infant, capable of copulation, in ſuch caſe puniſhment is incurred by the *man* alone, according to all the doctors. The argument of *Ziffer* is that a plea on the part of the *woman* does not occaſion the remiſſion of puniſhment with reſpect to the *man*; and in the ſame manner, a plea on the part of the *man* does not occaſion puniſhment to be remitted with reſpect to the *woman*; becauſe each party is reſponſible only for their own act. The argument of our doctors is that the act of whoredom proceeds from the man, the woman being no more than merely the *ſubject* of it, and hence it is that the man is denominated by the *active* term in copulation or whoredom and the woman by the *paſſive* *.

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* [In the original] " The man is denominated the *Watee*, or *Zanee*, and the woman the *Mowtooa*, or *Moozneea*. The two firſt are the active participles meaning the *copulata*, and the *whoremonger*; the two ſecond are theſe terms expreſſed in the feminine participle *paſſive*. It is not eaſy to convey the full force and meaning of ſuch paſſages in any tranſlation.

Objection.—The woman is alſo termed *Záneea**, as appears in the *Koran.*

Reply.—The woman is termed *Záneea* by a metonymical figure, which ſometimes uſes the *active* participle for the *paſſive*; or it may on this occaſion be employed becauſe the woman is the *primary* cauſe of the act of whoredom, by her admitting the man to the commiſſion of it. Puniſhment, with reſpect to a *woman*, therefore, depends upon the circumſtance of her admitting a man to commit the act of whoredom with her; but the act of a *boy* is not *whoredom*, as *whoredom* is an act proceeding from a perſon who has been called upon to refrain from it, and the perpetrator of which is an offender, by his commiſſion of it; and as the act of a *boy* is not of this nature, it follows that puniſhment is not incurred by his act.

Whoredom ul- ot u- niſhment.

If a ſovereign prince ſhould compel a man to commit whoredom, there is no puniſhment incurred by that man.—*Aboo Haneefa* had held a prior opinion, that the man is liable to puniſhment, (and ſuch is the doctrine of *Ziffer*)—becauſe a man cannot commit the act of whoredom unleſs the virile member be properly diſtended, which diſtention is a token of deſire on his part:—*compulſion*, therefore, cannot be proved with reſpect to him. The reaſon for the more recent opinion is that the *means* of compulſion, (namely, the power of the ſovereign,) exiſts both actually and apparently; and the diſtention of the virile member is no certain proof of deſire, ſince it ſometimes occurs independant of any operation of the mind, as in *ſleep*, for inſtance; this circumſtance, therefore, is of no weight in competition with a fact which admits of *actual proof*, namely, the *compulſion*. But if any other perſon than the ſovereign ſhould compel a man to commit whoredom, the man thereby incurs puniſhment according to *Haneefa*. The two diſciples have ſaid that no puniſhment is incurred in this caſe, becauſe the compulſion which is the obſtruction to the puniſhment in the former caſes may alſo proceed from *others* than the ſovereign: but *Haneefa* argues that this ſpecies of compulſion cannot be ſuppoſed to proceed from any except the *ſovereign*;—becauſe no other perſon is poſſeſſed of the means of ſuch compulſion, ſince the ſovereign is enabled to repel it in all inferior perſons, as the ſovereign authority is inſtituted by the law for the purpoſe of repelling tyranny;—and alſo, becauſe all others ſtand in awe of the ſovereign, and hence no ſuch compulſion can proceed from them. It is to be remarked that the learned in the law impute this difference of opinion between *Haneefa* and the two diſciples to the difference of the times in which they lived,—for in the time of *Haneefa* others than the ſovereign were not poſſeſſed of any power which it was not in the ſovereign's power to repel; but in the time of the two diſciples every petty ruler poſſeſſed a power independant of the ſovereign, and hence the compulſion of *others* than the ſovereign afforded (in thoſe times) a ground of doubt ſufficient to prevent puniſhment.

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* The fem. act. part. from *Zinna*.

IF a man make a confeſſion four times, at four different appearances, [before the *Kâzee*] "that he has committed whoredom with "ſuch a woman," and the woman ſhould thereupon declare, "that "he had married her,"—Or, if a woman ſhould thus make confeſſion that "ſuch a man had committed whoredom with her," and the man ſhould plead that "he had been already married to her,"—in this caſe no puniſhment falls upon either party, becauſe the plea of marriage is poſſibly true, and therefore occaſions a demur; but the man owes the woman a dower, ſince the enjoyment of the woman's perſon cannot be admitted *gratuitouſly*, as a woman's perſon is an object of reſpect.

Caſe of one of the parties confeſſing *whoredom*, and the other pleading a *marriage*.

IF a man commit whoredom with the female ſlave of another, to ſuch a degree as that the ſaid female ſlave dies, the man incurs two penalties,—*one*, the puniſhment of whoredom, and the *other*, the payment of the value of ſuch ſlave to her owner,—becauſe he has

Caſe of

male ſlave of another, who *dies* in quence;

here committed two offences, *whoredom* and *murder*, and hence the law is to be carried into execution with reſpect to both. It is recorded from *Aboo Yooſaf* that puniſhment is not incurred by the man, becauſe the obligation of reſponſibility, which lies upon him, is a cauſe of his property in the ſlave; and the occurrence of a cauſe of property, before puniſhment has taken place, prevents the infliction of it, (as where, a thief, for inſtance, purchaſes the property ſtolen of the proprietor before his hand is ſtruck off,) and is the ſame as if a man were firſt to commit whoredom with a female ſlave, and then to purchaſe her of her maſter, in which caſe he incurs puniſhment, according to *Haneefa*, but not according to *Aboo Yooſaf*, and ſo in this caſe likewiſe. *Haneefa* and *Mohammed* ſay that the reſponſibility, in this caſe, is a reſponſibility for *murder*, (in the manner of the *Deeyat*, or *fine of blood*,) which does not occaſion a right of property [over

or who goes *blind.*

If a man commit whoredom with the female ſlave of another, to ſuch a degree that ſhe loſes her ſight, he owes the price of the ſaid ſlave to her owner, and puniſhment drops, becauſe the ſlave, by the man being thus reſponſible for her value, becomes his property, and ſhe is ſtill actually exiſting, wherefore the circumſtance of his thus obtaining a property in her occaſions a demur ſufficient to prevent the puniſhment.

The *ſovereign* is not

and liable to retaliation.

If a ſupreme ruler (ſuch as the *Khâlif*, for the time being) commit any offence puniſhable by law, ſuch as *whoredom*, *theft*, or , he is not ſubject to any puniſhment, (but yet if he commit *murder* he is ſubject to the law of retaliation, and he is alſo accountable in matters of property,)—becauſe *puniſhment* is a right of God, the infliction of which is committed to the *Khâlif* [or other ſupreme magiſtrate,] and to none elſe; and he cannot inflict puniſhment upon himſelf, as in this there is no advantage, becauſe the good propoſed in puniſhment is that it may operate as a warning to deter mankind from ſin, and this is not obtained by a perſon's inflicting puniſhment upon himſelf: contrary to the rights of the *individual*, ſuch as the laws of *retaliation*, and of *property*, the penalties of which may be exacted of the *Khâlif*, as the claimant of right may obtain ſatisfaction either by the *Khâlif* empowering him to exact his right from himſelf, or by the claimant appealing for aſſiſtance to the collective body of the *Muſſulmans*. And puniſhment for ſlander, (although it be in ſome ſhape a right of the *individual*,) is ſubject to the ſame rule with other puniſhments which are a right of GOD, as the learned have declared that in the puniſhment for ſlander the right of GOD is chiefly conſidered.

CHAP. III.

Of Evidence in *Whoredom*, and of Retraction therefrom.

Delay in giving evidence deſtroys the lidity of i except in caſes of

IF witneſſes bear evidence at a diſtant period * [after the perpetration of the alleged offence,] where there had exiſted no obſtruction (ſuch as their diſtance from the magiſtrate, and ſo forth,) their teſtimony is not to be credited, except in a caſe of *ſlander*. It is recorded in the *Jama Sagheer*,—" If witneſſes bear evidence againſt any perſon, with " reſpect to *theft*, or *wine-drinking*, or *whoredom*, after a certain pe- " riod of time ſhall have elapſed, ſuch teſtimony is not to be received; " but yet the perſon ſo accuſed of theft is reſponſible for the value of " the goods alleged to have been ſtolen." The principle upon which this caſe proceeds is, that all evidence, with reſpect to ſuch puniſhments as are purely a right of God, is vitiated and rendered void by ſuch a delay in the production of it as amounts to *Takâdim:* but with *Shafeï* it is not rendered void, for he conſiders thoſe puniſhments as a right of the individual, and ſuppoſes evidence under this circumſtance to be the ſame as confeſſion inducing puniſhment; that is to ſay, as diſtance of time [*Takâdim*] does not affect the validity of confeſſion, inducing a diſtant puniſhment, ſo in the ſame manner diſtance of time does not forbid the reception of evidence reſpecting the rights of the individual, becauſe it is apparent that the evidences ſpeak truly; and the ſame reaſon holds in ſuch puniſhments as are purely a right of God.——The argument of our doctors is that a witneſs in a penal cauſe has two things at his option, both equally laudable; the *firſt*, evidence to an offence committed againſt the laws;—the *ſecond*, the veiling and concealment of infirmity:—now if it be admitted that the delay in giving in the evidence aroſe from the charitable motive laſt mentioned, it follows that any ſubſequent evidence could only ariſe from motives of malice, or of private intereſt, exciting the witneſs thereto, in which caſe the witneſs incurs a ſuſpenſion deſtructive of the validity of his evidence: if, on the other hand, the delay ſhould not have ariſen from a wiſh to cover infirmity, the perſon giving evidence after ſuch delay muſt be held unworthy of attention, as having for ſo long a time neglected that which was incumbent upon him, namely, *the giving of evidence*:—from all which it follows that, after ſuch a lapſe of time as amounts to *Takâdim*, the witneſſes are clearly liable to ſuſpicion, either from their *falſity*, or their *unworthineſs*; and this ſuſpicion impugns the credibility of their teſtimony. This caſe is contrary to a caſe of *confeſſion*, as men do not bear malice againſt *themſelves*; and puniſhment for whoredom, or wine-drinking, or theft, are purely a right of God, whence the retractation of a perſon who makes a confeſſion inducing ſuch puniſhments is approved; and for this reaſon, diſtance of time in thoſe inſtances forbids the reception of evidence: but puniſhment for ſlander is a right of the individual, as by it the ſcandal is removed from the perſon accuſed by the ſlanderer; (whence the retractation of a perſon acknowledging his having ſlandered another is not admitted;)—and diſtance of time, in a caſe which regards the rights of the individual, does not impugn the credibility of the evidence, as the witneſſes here do not fall under any ſuſpicion of ſiniſter motives from delay in their teſtimony, ſince the claim of the plaintiff is conditional to the admiſſion of evidence concerning the rights of the individual, and therefore their delay in giving evidence is to be attributed to the plaintiff not having called for it. All this is contrary to a caſe of puniſhment for *theft*, in which the evidence of witneſſes is invalidated by delay, becauſe the witneſſes, by their delay in bearing teſtimony, become ſubject to ſuſpicion of ſiniſter motives, as here the claim is not a condition of puniſhment, ſince the puniſhment is purely a right of GOD, the claim being a condition only in matters of property; and alſo, becauſe theft is chiefly committed during the night, at a time when the owner of the property is aſleep and unwatchful, wherefore it is incumbent upon the witneſſes to appriſe the proprietor of the theft, and to bear teſtimony to it; but as, in a caſe of diſtance of time, or *Takâdim*, they have not ſo borne evidence, they become criminal and unworthy of credit from their neglect.

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* Arab. *Mootkâdim*: this is the participle from *Takâdim*; by which is underſtood ſuch a diſtance of time as ſuffices to prevent puniſhment. It operates in a way ſomewhat ſimilar to our *ſtatutary limitations*.

Delay alſo prevents puniſhment, after the *Kâzee*'s decree of it.

TAKÂDIM, or *diſtance of time*, as it prohibits the admiſſion of evidence in the firſt inſtance, ſo it prohibits (according to our doctors) the infliction of puniſhment after the decree of the *Kâzee*: if, therefore, the convicted perſon were to abſcond, after having received a part of his puniſhment, and, after the lapſe of a period ſufficient to conſtitute *Takâdim*, be taken and brought back, the remainder of the correction cannot then be inflicted upon him,—becauſe the infliction of the *whole* puniſhment is included in the *Kâzee*'s decree; and a part of it ſtands in the ſame predicament with the whole; and as the *Kâzee*, becauſe of diſtance of time, could not decree puniſhment, ſo neither can he, in the ſame circumſtance, decree the infliction of the *remainder* of the puniſhment.

Limitation of the delay in queſtion.

There are various opinions among the learned reſpecting the limitation of the *Takâdim*, or *diſtance of time*, now under conſideration. In the *Jama Sagheer* the limitation of it appears to be *ſix months*; and the ſame is mentioned by *Tahâvee*. *Haneefa* does not preſcribe any limitation, but leaves it to the diſcretion of the magiſtrate, to be determined according to the cuſtoms of each reſpective age or country. It is recorded from *Mohammed* that he fixed the limitation of it to *one month*, as any leſs ſpace of time falls within the deſcription of *Ajil**; (and there is a record from *Haneefa* and *Aboo Yooſaf* to the ſame effect;) and this laſt is the moſt approved doctrine, where the witneſſes are not at the diſtance of a month's journey from the *Kâzee*; but where there is a diſtance of a month's journey between them, their teſtimony muſt be credited, becauſe there appears on this occaſion an obſtruction to their giving evidence, namely, their diſtance from the *Kâzee*; and hence they are not in ſuch a caſe liable to ſuſpicion. The limitation of *Takâdim*, in reſpect to the puniſhment of *wine-drinking*, is alſo the ſame, according to *Mohammed*. According to the two *Elders* the limitation of it is confined to the going off of the ſmell of the liquor, as ſhall be hereafter demonſtrated.

The evidence of the witneſſes is valid againſt *one* of the parties, although the

If witneſſes bear evidence againſt a perſon "that he has committed whoredom with a certain woman," and the woman be abſent, yet puniſhment muſt be inflicted on the man: but if witneſſes bear evidence againſt a man that he has committed theft, and the owner of the property ſtolen be abſent, the hand of the accuſed cannot be cut off. The difference between theſe two caſes is that in *theft* the previous claim of the plaintiff is a neceſſary condition to the admiſſion of evidence, but not in *whoredom*;—and the owner of the property ſtolen being abſent, no claim can be inſtituted.

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* By *Ajil* is meant a ſpace of time ſo ſhort as not to admit of its taking the deſcription of *delay*.—Thus the payment of a debt is termed *Moâjil* [prompt] where it takes place at any time within a month after it is due.

OBJECTION.—It would appear that, in the caſe of whoredom alſo, puniſhment ought not to be inflicted on the man, becauſe it is poſſible that if the woman were preſent ſhe might advance ſome plea productive of a demur.

REPLY.—This is a concluſion founded on mere conjecture, and therefore of no weight.

unleſs the other be *unknown*.

IF witneſſes give evidence againſt a man "that he has committed whoredom with a woman whom they do not know," puniſhment is not to be inflicted upon the man, becauſe it is poſſible that the woman may be his wife, or his ſlave, and this, with reſpect to a *Muſſulman* is moſt probable. But if a man make confeſſion that "he has committed whoredom with a woman unknown," puniſhment muſt be inflicted on him, ſince, if the woman with whom he committed the fact had been either his wife or his ſlave, ſhe could not have been unknown to him.

Caſe of a contradiction in the evidence.

IF two witneſſes give evidence againſt a man, that "he has "committed whoredom with ſuch a woman, and forced her there-"to," and two other witneſſes give evidence to the ſame fact, but with this variation, that "the woman was conſenting,"—In this caſe, (according to *Haneefa* and *Ziffer*) puniſhment drops with reſpect to both the parties; and ſuch alſo is the opinion of *Shafeï*—The two diſciples ſay that puniſhment is in this caſe to be inflicted on the *man* alone; becauſe the varying witneſſes do yet agree in this that the man has committed whoredom, which is the occaſion of puniſhment to him; for the only difference between the witneſſes is that one party of them teſtifies to an additional offence, (namely, his having *forced* the woman,) which does not occaſion the remiſſion of puniſhment with reſpect to him: contrary to the caſe of a *woman*, with reſpect to whom puniſhment drops, becauſe her conſent is the condition on which her being liable to puniſhment depends, and this conſent is not proved, becauſe of the contradiction among the witneſſes.

neſſes. The arguments of *Haneefa* on this point are twofold;—FIRST, the evidence is contradictory with reſpect to the *man*, becauſe whoredom is *one act*, committed by *two perſons*, the *man* and the *woman*,—and as the evidence is contradictory with reſpect to the *woman*, it muſt be held ſo with regard to the *man* likewiſe;——SECONDLY, the two witneſſes who bore teſtimony to the conſent of the woman are *ſlanderers*, and conſequently their teſtimony is unworthy of any credit.

OBJECTION.—From this it would appear that puniſhment for ſlander is incurred by them, whereas it is not ſo.

REPLY.—Puniſhment for ſlander cannot be inflicted on them, on account of the evidence of the other two witneſſes, who have depoſed to force having been uſed by the man; for the woman can no longer be conſidered as *married*, in the ſenſe which induces puniſhment for ſlander, ſince the deſcription of *married* (in this ſenſe) is not applicable to a woman after ſhe has been enjoyed *unlawfully*, although ſhe be *forced*.

Contradiction among the witneſſes, in regard to the *place*, prevents puniſhment.

IF two witneſſes bear evidence againſt a man, that "he has committed whoredom with ſuch a woman in *Koofa*," and two others, "that he had committed ſuch whoredom with that woman in *Baſra*," in this caſe puniſhment drops with reſpect to both the man and the woman, becauſe the circumſtance alleged is the act of whoredom, and that is contradicted by the contradiction with reſpect to the place. The evidence to the fact is here in both inſtances defective, but yet the witneſſes are not liable to puniſhment for ſlander, becauſe of a demur, as the fact of *whoredom*, to which they bear teſtimony, is *one ſingle whoredom* with reſpect to the perpetration of it, ſince the whoremonger is the ſame perſon, and the whore is alſo the ſame perſon, in the evidence of the contradictory witneſſes on both ſides, and there is no difference except with reſpect to the place in which the fact was committed. But if witneſſes contradict each other, by two perſons bearing evidence that ſuch a man has committed whoredom with ſuch a woman in ſuch a ſpot of ſuch a houſe, and by two other perſons giving evidence that the man had committed the whoredom with that woman in another ſpot of the houſe, in this caſe puniſhment is to be inflicted upon that man. This is upon a favourable conſtruction *. Analogy would ſuggeſt that puniſhment is not incurred, ſince there is alſo in this caſe a poſitive contradiction with reſpect to the place in which the fact was committed. But the reaſon for a more favourable conſtruction is that a coincidence between the teſtimonies may be conceived, by ſuppoſing the act to have been begun in *one* corner of the houſe, and compleated in *another* corner, in conſequence of the motions of the parties; and it is alſo poſſible that the act may have been committed in the *middle* of the houſe, and a perſon ſeeing it from the front may conceive it to be performed in the *forepart* of the houſe, and another viewing it from the back part may conceive it to be performed in the *back part* of the houſe; and each bears evidence according to his own conception.

Evidence, but contradictory in point of *place*,

IF four witneſſes bear evidence againſt a man "that he has been "guilty of whoredom with ſuch a woman at ſun-riſe in *Hind*," (a place near *Koofa*, which is alſo called *the place of Abdal-Rihmân*,) and four other witneſſes give evidence againſt the man that "he has "been guilty of whoredom with ſuch a woman at ſunriſe, in *Nookhla*," (which is alſo a place near *Koofa*,) in this caſe neither the man nor the woman are liable to puniſhment for whoredom, nor are their accuſers liable to puniſhment for ſlander. The accuſed are not liable to puniſhment for whoredom, becauſe the teſtimony of the contradicting witneſſes muſt, on one part, be *falſe*, although it be impoſſible to aſcertain on which ſide of the evidence the falſehood lies: and the accuſers are not liable to puniſhment for *ſlander*, becauſe it is poſſible that the evidence on one ſide may be true; and as this poſſibility applies equally to both parties, puniſhment for ſlander cannot be inflicted upon either.

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* That is to ſay, *with reſpect to the witneſſes*; for if the evidence be not ſufficient to ſubject the parties to puniſhment, the witneſſes are liable to puniſhment for *ſlander*.

Evidence againſt a woman who is afterwards proved to be a *virgin* is void.

If four witneſſes bear teſtimony againſt a woman, that "ſhe has "committed whoredom with ſuch a man,"—and it ſhould appear, upon examination made by females employed for that purpoſe, that the woman is ſtill a *virgin*, in ſuch caſe neither of the perſons thus accuſed are liable to puniſhment for whoredom: nor are the accuſers liable to puniſhment for ſlander, becauſe the evidence of the females employed to examine the woman accuſed is a proof which ſuffices to prevent the infliction of puniſhment for whoredom upon the parties accuſed; but it is not a proof ſufficient to ſubject the accuſers to puniſhment for ſlander *: puniſhment for whoredom, therefore, is not inflicted on the accuſed; nor are the accuſers liable to puniſhment for ſlander.

Incompetent witneſſes, by bearing teſtimony to whoredom, incur puniſhment for ſlander.

If four witneſſes give evidence againſt a man that "he has committed whoredom with ſuch a woman," and it ſhould happen that theſe witneſſes are *blind*, or have ever been puniſhed for ſlander; or that one of them is a ſlave, or has been puniſhed for ſlander; in this caſe the witneſſes are all liable to puniſhment for ſlander; but the accuſed does not incur puniſhment for whoredom; becauſe, as a matter of *property* cannot be determined by the evidence of ſuch witneſſes, it is impoſſible that *puniſhment* ſhould be eſtabliſhed by it; and the witneſſes, where they are all blind, or have all before ſuffered puniſhment for ſlander, are incapable of bearing evidence; and where one of them is a ſlave, he is totally incapable of bearing evidence; and ſo alſo of one of them who has before ſuffered puniſhment for ſlander:—by their evidence, therefore, even a *doubtful* whoredom is not eſtabliſhed; and hence their teſtimony becomes converted into *ſlander*; wherefore they are *ſlanderers*, and puniſhment for ſlander is conſequently incurred upon them.

The evidence of *reprobate*

If four witneſſes bear evidence to whoredom at a time when they are reprobate *, or if this character ſhould be affixed upon them by competent proof after they have given evidence, they are not liable to puniſhment for ſlander; becauſe, although the evidence of a reprobate perſon be defective, from his veracity being liable to ſuſpicion on account of the badneſs of his character, yet he is a competent witneſs, inſomuch that if a *Kâzee* iſſue a decree upon the evidence of a reprobate perſon, his decree is valid, according to our doctors. The evidence of reprobate perſons, therefore, goes to eſtabliſh a *doubtful* whoredom, and they are conſequently not expoſed to puniſhment for ſlander; and ſince, moreover, from the defect in their teſtimony, on account of their being reprobate, a doubt appears that whoredom has *not* been committed, the accuſed are therefore not liable to puniſhment for whoredom. *Shafeï* diſſents from our opinion concerning this caſe, as he holds a reprobate perſon to be incapable of being an evidence, and conſequently, that he ſtands in the ſame predicament as

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* Becauſe it is, notwithſtanding, poſſible that the act may have been performed upon the woman, although not to ſuch a degree as to deſtroy the appearances of virginity.

perſons is neither attended with puniſhment for whoredom to the *accuſed*, nor with puniſhmen der *cuſers*.

IF *fewer* than four perſons bear evidence to whoredom, puniſhment for ſlander is applicable to them:—this effect is induced, becauſe, although their teſtimony be good, yet teſtimony to whoredom is ſo accounted only where it amounts to *evidence*; and the teſtimony of fewer than four perſons, in a caſe of whoredom, is not evidence, ſo as to be accounted *good*; wherefore it is *ſlander*.

Witneſſes defective in point of *num-*

IF four perſons bear evidence againſt a man, that "he has been "guilty of whoredom," and the *Kázee* ſhould inflict puniſhment for whoredom upon the parties accordingly, and it ſhould afterwards appear that one of the witneſſes is a *ſlave*, or has at any time been puniſhed for ſlander, puniſhment is incurred by *all* the witneſſes, as the witneſſes are on this occaſion only *three* in number. Obſerve however, that in this caſe no *Ariſh*, or *fine of damage*, is due on account

and ſo

where one of them afterwards proves *incompetent*: but no fine is

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* Arab. *Fâſik*. It is elſewhere rendered *unjuſt*; but the term here adopted approaches, perhaps, nearer to the real meaning. *Fâſik* ſignifies a perſon who neglects decorum in his and *behaviour*, and whoſe evidence, therefore, is not held to be admiſſible.

of

the accuſed ſuffer *lapidation*, when a *deyit* is due from the publick treaſury.

of ſuch flagellation, either from the witneſſes, or from the public treaſury: but if, in conſequence of the evidence, the perſon accuſed ſhould have been ſtoned to death by a ſentence of lapidation, the *Deyit*, or fine of blood, is due from the publick treaſury. This is the doctrine of *Haneefa.* The two diſciples ſay that the fine of damage is alſo due from the publick treaſury in the former caſe. The compiler of the *Hedaya* remarks that this difference of opinion obtains where the accuſed happens to be *cut* by the ſtripes he has received. The two diſciples alſo hold that if the accuſed ſhould chance to *die* in conſequence of the correction by ſcourging, the fine of blood is due from the publick treaſury;—in oppoſition to *Haneefa*;—and likewiſe, that if the witneſſes ſhould retract from their evidence after the accuſed has been cut by ſcourging, or died in conſequence thereof, they [the witneſſes] become reſponſible for the fine of damage in the *firſt* inſtance, or the fine of blood in the *ſecond.* The argument of the two diſciples is that, in conſequence of the teſtimony of the witneſſes, ſtripes are to be inflicted *generally* *, whether they be of a *cutting* nature or otherwiſe, ſince to avoid cutting is not always in the executioner's power; the ſcourging, therefore, which is due in conſequence of the teſtimony of the witneſſes, comprehends both *cutting* ſtripes, and alſo ſtripes which do *not* cut, and conſequently the cutting is to be referred to the teſtimony of the evidences, whence they are reſponſible for the ſame, where they retract from their teſtimony. But where the witneſſes do not retract, (that is where their evidence is ſet at nought, not by *retractation*, but by one of them being afterwards diſcovered to be *incompetent*,) the fine of blood is due from the publick treaſury, becauſe the act of the executioner is to be referred to the *Kâzee*, and the *Kâzee* acts on behalf of the community of *Muſſulmans*, wherefore the atonement for the act falls upon that which is the property of all the *Muſſulmans*, namely, the publick treaſury, in the ſame manner as in a caſe of *wounds*, or *retaliation*. The argument of *Haneefa* is that as nothing is due in conſequence of the teſtimony of the witneſſes, further than *puniſhment*, (by which is underſtood ſuch a ſcourging as excites pain, but ſuch as evidently cannot prove deſtructive, except through the fault of the flagellator, proceeding from his careleſſneſs or incapacity,) the cutting, therefore, is to be referred to *him alone*, and not to the *teſtimony of the witneſſes:* but yet (according to the *Rawayet-Saheeh*) the ſcourger is not made reſponſible, leſt men ſhould be deterred from the infliction of puniſhment, by an apprehenſion of being made anſwerable for the conſequences of it.

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* That is, not reſtricted to any particular deſcription of ſtripes.

The teſtimony of *ſecondary* witneſſes invalidates that of *primary* witneſſes.

IF four witneſſes bear teſtimony to an evidence given by four *other* witneſſes, againſt a man, of his having committed whoredom, puniſhment is not to be inflicted upon the perſon ſo accuſed, becauſe evidence in ſupport of evidence introduces an increaſe of doubt, ſince wherever, in the recital of a fact, the channels of communication are multiplied, the doubt of it's truth increaſes in proportion; and there is in this caſe no neceſſity for conſidering the *ſecondary* witneſſes in the light of *original* witneſſes. And if the four original witneſſes ſhould afterwards come and bear teſtimony of themſelves to the whoredom, in the place where the ſecondary witneſſes had before given their evidence, here alſo no puniſhment is to be inflicted on the accuſed, becauſe their teſtimony has already been rejected in *one* ſhape, in conſequence of the rejection of the teſtimony of the ſecondary witneſſes, reſpecting the ſame fact, as the ſecondary witneſſes are the ſubſtitutes of the primary witneſſes, from the circumſtance of thoſe having directed them, and thrown the matter upon them. But here puniſhment for ſlander is not to be inflicted on either the original or the ſecondary witneſſes, becauſe both are complete in point of *number*, although puniſhment for whoredom be not inflicted, on account of a *doubt*, which is ſuch as ſuffices in bar of puniſhment for whoredom, but is not ſufficient to ſubject the witneſſes to puniſhment for ſlander.

One of *four* witneſſes retracting, *af-* [illegible] cuſed, incurs puniſhment for ſlander, and is reſponſible for one-fourth of the fine of blood:

If four witneſſes give evidence againſt a man, that he has committed whoredom, and he ſuffer lapidation, and one of the witneſſes afterwards retract, puniſhment for ſlander is to be inflicted upon him alone, and he is alſo reſponſible for one-fourth of the fine of blood. The reaſon for *one-fourth* only of the fine of blood being due from him is that *three-fourths* of the veracity of the evidence remain, in conſequence of the evidence of the three remaining witneſſes ſtill continuing; by the evidence, therefore, of the witneſs who retracts, only *one fourth* of the veracity is affected.—(*Shafeï* ſays that the *death* of the retracting witneſs is incurred, and not a fine upon his *property*, according to his tenets concerning witneſſes in retaliation, as ſhall be hereafter ſhewn in treating of *Deyit.*)——That puniſhment for ſlander is incurred by the witneſs is the opinion of our three doctors. *Ziffer* ſays that puniſhment for ſlander is not due, becauſe, if the ſlanderer be conſidered as the ſlanderer of a *living* perſon, his ſlander is rendered void by the *death* of that perſon; or, if he be conſidered as the ſlanderer of a *defunct*, the ſaid defunct has ſuffered lapidation under a ſentence of the *Kâzee*, whence originates a demur reſpecting the propriety of puniſhment for *ſlander*. The argument of our doctors is that evidence to whoredom does not become ſlander, in conſequence of retractation, on any other account than as the evidence is thereby cancelled; the evidence, therefore, at the time of retractation, is rendered *ſlander* with reſpect to the *dead*; and a perſon who ſlanders a married perſon defunct is liable to puniſhment for ſlander. With reſpect to what *Ziffer* advances, (that the defunct has ſuffered lapidation under a ſentence of the *Kâzee*, which gives riſe to a demur reſpecting the propriety of puniſhment for ſlander,) we reply, that upon the evidence, which is the proof, being cancelled by retractation, the decree of the *Kâzee*, ſentencing lapidation, does not give riſe to any demur in bar of puniſhment for ſlander; wherefore puniſhment for ſlander is to be inflicted upon him who retracts from his teſtimony: contrary to what would be the caſe if any *other* than the retracting perſon were to ſlander him who had ſuffered lapidation, as the latter is not a *Mahſan* in reſpect to any other perſon, ſince the ſentence of the *Kâzee* againſt the deceaſed is, with regard to that *other*, *proper* and *juſt*.—What is now advanced regards a caſe where one of the witneſſes retracts, *after* lapidation: but if one of them were to retract *before* the execution of lapidation, after ſentence has been paſſed by the *Kazee*, in this caſe puniſhment for ſlander is to be inflicted on all the witneſſes; and the puniſhment of the accuſed is remitted. This is the doctrine of the two *Elders*. *Mohammed* ſays that, in this caſe alſo, puniſhment for ſlander is to be inflicted on the retracting witneſs alone, becauſe the evidence of the witneſſes has been corroborated by the *Kâzee*'s ſentence, and therefore is not cancelled except with reſpect to the *retractor* alone,—in the ſame manner as where the witneſs retracts after the execution of the ſentence.—The argument of the two *Elders* is, that the infliction of puniſhment is only a ſupplement to the ſentence of the *Kâzee*; the retractation in the preſent inſtance therefore, is the ſame in effect, as if one of the witneſſes were to retract before the ſentence had been paſſed; (for which reaſon puniſhment drops with reſpect to the accuſed;) and if one of the witneſſes were to retract previous to the *Kâzee*'s ſentence of lapidation, puniſhment for ſlander would be inflicted upon all of them. *Ziffer* ſays that in this caſe alſo puniſhment for ſlander would be inflicted on the retracting witneſs alone, becauſe his retractation is not of account with regard to any except himſelf. The argument of our doctors is that the declaration of the witneſſes is radically *ſlander*, and does not become *evidence* until it be ſo rendered by a ſentence of the *Kâzee*, paſſed in conformity to it; and where this ſentence has not been paſſed, ſuch declaration continues to be ſlander, as it radically was; wherefore puniſhment for ſlander is to be inflicted upon all of them.

but if he retract *before* lapidation, all the witneſſes are liable to puniſhment.

IF *five* perſons bear evidence [to whoredom,] and one of the five retract after lapidation, no penalty whatſoever is incurred by the witneſs ſo retracting,—becauſe, *four* witneſſes ſtill remaining, the evidence

One of *five* witneſſes, re-

ment or *fine*.

evidence remains complete. But if, afterwards, one of the remaining four witneſſes ſhould retract, puniſhment for ſlander is then due upon both retractors, and each is indebted in one-fourth of the fine of blood. Puniſhment for ſlander is due upon them, becauſe evidence to whoredom is rendered ſlander by ſubſequent retractation, as before explained; and they are each indebted one-fourth of the fine of blood, becauſe, by the three perſevering witneſſes ſtill remaining, three-fourths of the validity of the body of evidence continues unimpeached, as the perſeverance of thoſe who *remain* is regarded, and not the retractation of thoſe who *draw-back*, (according to what is ſaid upon that head in its proper place;) and as only one *fourth* of the veracity is deſtroyed by the retractation of theſe two witneſſes, it follows that they remain reſponſible for *one fourth* only of the fine of blood.

Where *juſtified* witneſſes prove afterwards defective, the fine of blood is due from the *purgators* of theſe witneſſes.

If four witneſſes give evidence of whoredom againſt a man, and theſe witneſſes be juſtified by *Tazkeeat**, and the accuſed ſuffer lapidation, and it ſhould afterwards appear that thoſe witneſſes were *idolaters*, or *ſlaves*, (by the purgators retracting their evidence of juſtification, and declaring them to be *ſlaves*, or *idolaters*,) in this caſe the fine of blood is due from the purgators, according to *Haneefa*. The two diſciples ſay that in this caſe the fine of blood falls upon the publick treaſury. Some hold that this difference exiſts only where the purgators, in their retractation, declare that their juſtification of the witneſſes had been according to the beſt of their knowledge and belief at that time. The argument of the two diſciples is that the purgators have done nothing more than merely ſpeaking *in commendation* of the witneſſes, in the ſame manner as if they were to ſpeak in commendation of the *accuſed*, by teſtifying to his being within the deſcription of *Ihſân* [*], in which caſe nothing is due from them, and ſo here likewiſe. The argument of *Haneefa* is, that teſtimony of the witneſſes is not proof, nor worthy of any regard, but through the juſtification of the purgators; wherefore the juſtification is, in reality, the efficient cauſe of the ſentence; whence the ſentence muſt be referred and attributed thereto: contrary to their bearing teſtimony to the *Ihſân* of the accuſed, as that ſtate is conditional to a perſon being conſidered a *Mahſan*,—that is, *married*, under ſuch circumſtances as (in caſe of whoredom) ſubject him to lapidation. It is alſo to be remarked that, whether the before-mentioned juſtifier ſhould pronounce the juſtification in the proper and formal terms of evidence,—(thus, "*We teſtify that* theſe witneſſes are *freemen* and *believers*") or *not* in the formal terms of evidence,—(as thus,—"Theſe are *freemen* and "*believers*,") the effect is in both caſes the ſame, and there is no difference whatever between them; this, however, holds only where the purgators reſtrict their juſtification to the *freedom* or *faith* of the evidences, as above; but if they ſhould ſay, "theſe witneſſes are "*âdils*" [†], and it ſhould afterwards appear that they are *ſlaves*, in this caſe the purgators are not reſponſible for the fine of blood; becauſe *ſlaves* are, in ſome inſtances, of the deſcription of *âdils*:—neither are the witneſſes, in this caſe, reſponſible for the fine of blood, as their declaration does not amount to *evidence* [‡]; nor are they ſubject to puniſhment for ſlander, becauſe their accuſation was made againſt a *living* perſon, but that perſon is now dead, and his heirs cannot procure puniſhment for ſlander to be inflicted on them, as it is not inheritable. If the purgators perſevere in their juſtification, or have unknowingly borne teſtimony therein, and it ſhould afterwards appear that the witneſſes are of an *incompetent* deſcription, nothing whatever falls on the purgators:—but in this caſe the *fine of blood* falls upon the *public treaſury.*

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* That is, by a certain number of other witneſſes bearing teſtimony to the *compe-* &c. of witneſſes who are giving evidence in any cauſe, the former being denomi- the *Mozâkkees*, or purgators; the nature of this mode of juſtification is exhibited at

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[*] That is, by teſtifying that the accuſed is *married*, under ſuch circumſtances of *freedom*, and ſo forth, as (in caſe of whoredom) ſubjects a perſon to lapidation.

[†] Perſons of reſpectable character, in oppoſition to *reprobates*.

[‡] Becauſe they afterwards appear (from the retractation of the purgators) to be incompetent evidences.

Caſe in which the fine of blood falls he

If four perſons bear teſtimony of whoredom againſt a man, and the *Kâzee* ſentenced him to be ſtoned, and any perſon ſhould ſlay him, and it ſhould aftewards appear that the above witneſſes were incompetent, in ſuch caſe, the *fine of blood* falls upon the ſlayer, according to a favourable conſtruction of the law.—Analogy would ſuggeſt, in this caſe, that *retaliation* is incurred, as the ſlayer has killed an innocent perſon without cauſe: but the reaſons for a more favourable conſtruction of the law are twofold; FIRST, The *Kâzee*'s ſentence of lapidation was, in appearance, regular and valid, at the period of ſlaying, and hence was eſtabliſhed an erroneous admiſſibility of ſlaughter: contrary to a caſe in which the accuſed is ſlain before the *Kâzee* iſſues his decree of lapidation, as the teſtimony of the witneſs is not proof until then:—SECONDLY, The ſlayer has acted under a conception that the ſlaying of that man become allowable, he having a confidence in the argument of ſuch permiſſion, namely, the *Kâzee*'s ſentence of lapidation; and hence it is the ſame as where a perſon ſlays another, ſuppoſing him, from former circumſtances, to be an enemy, in which caſe the fine of blood is incumbent upon that perſon, and ſo here likewiſe.—It is to be obſerved that the fine of blood thus incurred is a charge upon the *eſtate* of the ſlayer, and does not fall upon his *tribe*, becauſe it is *wilful homicide*, for which the tribe is not reſponſible: and this fine of blood muſt be diſcharged within three years, [after the perpetration of the fact,] as being due on account of *homicide.* But if *no* perſon were in this manner to ſlay the accuſed, and he ſuffer lapidation by the ſentence of the *Kâzee*, and it ſhould afterwards appear that the witneſſes were incompetent,—the fine of blood in this caſe falls upon the public treaſury, becauſe the perſons who ſtone the accuſed act in conformity with the order of the *Kâzee*, and hence their act muſt be referred to the *Kâzee*; and as, if the *Kâzee* were to execute the ſentence upon the accuſed *with his own hands*, the fine of blood would fall upon the public treaſury, ſo alſo it falls upon the ſame, where any other perſon executes ſuch ſentence under the *Kâzee*'s authority. This caſe is evidently contrary to one where the *Kâzee* paſſes a ſentence of lapidation, and another perſon ſlays the accuſed in a different manner, and not by *ſtoning*; for in ſo doing he has not acted in conformity to the order of the magiſtrate.

If witneſſes bear evidence of whoredom againſt a man, declaring that "they had come to the knowledge of it by wilfully looking into "the perſon's private apartment at the time of the fact," yet ſuch evidence is to be credited, nor is it to be rejected on account of the manner in which the knowledge of the witneſſes was obtained, as their looking was allowable, in order that they might be enabled to bear evidence; they are therefore the ſame as *phyſicians* or *midwives* *.

Evidence to whoredom is valid, although the knowledge of the fact be unlawfully ob-

If four witneſſes bear evidence of whoredom againſt a man, and the accuſed ſhould plead that "he is not a *married* man," and it ſhould happen that he has a wife who has brought forth a child to him,—(in other words, ſhould deny the conſummation of his marriage, after the eſtabliſhment of all the conditions of it,) he is to be ſtoned, becauſe the effect of the eſtabliſhment of the child's parentage † is a conſequence of his having had carnal communication with his wife, (whence it is that if he were to pronounce a divorce upon her, a divorce reverſible takes place;)—and his being a *married man* is eſtabliſhed, on account of the aforeſaid effect: and if

The ac- [illegible] unfounded, does not prevent lapidation.

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* To explain this it may be proper to remark that a perſon's looking into the private apartment of another is an *unlawful act*, which, if it was not juſtified by the *motive*, would invalidate his teſtimony.

† Eſtabliſhed in him in virtue of his marriage.

the wife ſhould *not* have borne a child, yet if one man and two women, as witneſſes, bear teſtimony to the marriage of the accuſed, in this caſe lapidation is to be inflicted upon him. *Shafeï* ſays that the accuſed, in this caſe, does not ſuffer lapidation; and this his opinion is founded on his doctrine in the laws of evidence, that "the teſtimony "of women is not admiſſible, excepting in caſes of *property*."—*Ziffer* remarks that the circumſtance of the accuſed being a *married man*, although it appear to be only the *condition* of the ſentence, yet is in reality the *cauſe*, as rendering the offence more atrocious; wherefore the ſentence muſt be referred to that circumſtance; and this condition being, in reality, the *occaſion* thereof, the evidence of women cannot be admitted in it, any more than with reſpect to the original offence, namely, the *whoredom*. Thus it is the ſame as where two infidel ſubjects of the *Muſſulman* government teſtify concerning a *Muſſulman* ſlave, who has committed whoredom, that "his maſter had emancipated "him before the perpetration of the fact," which teſtimony would not be admitted, becauſe the *Ihſân* of the ſlave [that is, his being *a free married man*] is ſo far a *condition* of the ſentence as to be, in reality, a *cauſe* of it. The argument of our doctors is that marriage in a ſtate of freedom is an *honourable* ſtate, and is repugnant to the commiſſion of whoredom, (as was already ſtated,) wherefore this circumſtance cannot be, in *reality*, a cauſe of the ſentence. The teſtimony, therefore, of the witneſſes to the *Ihſân* of the accuſed is the ſame as their teſtimony in any other caſe than whoredom; and as their teſtimony to his *Ihſân* would in other caſes be credited, ſo alſo in a caſe of *whoredom*: contrary to the caſe of the two infidel ſubjects and the ſlave, as cited by *Ziffer*, becauſe there the freedom of the ſlave is proved by the teſtimony of thoſe two witneſſes: but it is not thereby proved that the date of the ſlave's freedom was antecedent to the commiſſion of whoredom, either becauſe a *Muſſulman* denies ſuch date,—or becauſe that circumſtance would be injurious to a *Muſſulman*. If the witneſſes who teſtify to *Ihſân* retract, yet they are not reſponſible for the fine of blood: contrary to the doctrine of *Ziffer*, according to what was before obſerved.

CHAP. IV.

Of *Hidd Shirrub*, or the *Puniſhment* for drinking *Wine.*

General rule.

IF a *Muſſulman* drink wine, and be ſeized whilſt his breath yet ſmells of the wine, or be brought before the *Kâzee* whilſt he is yet intoxicated therewith, and witneſſes give evidence, that "he has drank "wine," puniſhment for wine-drinking is to be inflicted upon him; and in the ſame manner, puniſhment is incurred by him when he *makes confeſſion* of having drank wine, whilſt his breath yet retains the ſmell; becauſe the offence of wine-drinking is proved upon him, and *Takâdim*, or *diſtance of time*[*], does not appear, ſince the flavour of the wine ſtill remains. This doctrine is originally founded upon a precept of the prophet, "*Whoever drinks of wine, let him ſuffer correction by* "*ſcourging, as often as he drinks thereof.*"

Puniſhment is not inflicted in a caſe of *confeſſion* or *accuſation*, made after the ſmell is gone off;

IF a man make confeſſion of having drank wine, after the ſmell has ceaſed, in this caſe puniſhment is not to be inflicted upon him, according to the two *Elders*. *Imâm Mohammed* maintains that it is to be inflicted. The ſame difference of opinion obtains in a caſe where witneſſes bear evidence againſt a man that "he has drank wine" after the ſmell has ceaſed. The reaſon of this diverſity of opinion is that *Takâdim*, or lapſe of time, forbids the reception of evidence in a caſe of wine-drinking, according to all the doctors: but *Mohammed* fixes the *limitation* of *Takâdim*, in wine-drinking, to a certain time, namely, *one month*, (according to the moſt approved authorities,) he conceiving an analogy between this, and a caſe of *whoredom*, becauſe *delay* is eſtabliſhed by *lapſe of time*, and not by the *ceaſing of a ſmell*; and the exiſtence or *non*-exiſtence of a ſmell is of no weight, as there are other things the flavour of which reſembles that of wine. According to the two *Elders*, on the contrary, *Takâdim* is eſtabliſhed by the nonexiſtence or departure of the ſmell, for two reaſons;—FIRST, a decree of *Abdoola Ibn Maſſâod*, who, when certain perſons brought before him a man charged with drinking wine, directed that "they "ſhould examine his breath, and that, if any flavour of wine were diſ-"covered, puniſhment ſhould then be inflicted upon him;" SECONDLY, the exiſtence of the effect, (namely the *ſmell*,) is an irrefragable proof of wine having been lately drank. And as to what *Mohammed* advances, that "there are other things the flavour of which reſembles "that of wine," it may be replied that the difference between the ſmell of wine, and other articles, may be eaſily diſtinguiſhed by one who is poſſeſſed of judgment and diſcernment, nor can any but ignorant perſons be doubtful concerning it. Thus, according to *Mohammed*, CONFESSION of wine-drinking is not rendered ineffectual by diſtance of time, in the ſame manner as (according to him) confeſſion of *whoredom* is not rendered ineffectual by diſtance of time, agreeably to what was before advanced:—with the two *Elders*, on the contrary,—puniſhment for wine-drinking is not to be inflicted but on the condition that the ſmell ſtill remain, becauſe *Ibn Maſſâod* ſtipulated that condition, as before ſtated.

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[*] See the preceding Chapter; p. 35.

unleſs this be owing to an unavoidable delay in bringing the accuſed to the ſeat of juſtice.

IF witneſſes ſeize a drinker of wine * at a time when he is intoxicated, or whilſt he ſtill retains the ſmell of the liquor, and carry him to a city where there is a *Kâzee*, and in the mean time the flavour or the intoxication ſhould ceaſe, before they arrive at the ſeat of juſtice, yet in this caſe puniſhment for wine-drinking is to be inflicted upon that perſon, according to all our doctors, becauſe there is an excuſe for the delay, analogous to that which is created by diſtance of place in a charge of *whoredom*; and the witneſſes are not ſuſpected where ſuch excuſe exiſts.

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* This caſe ſuppoſes his being ſeized in ſome remote place, at a diſtance from the ſeat of juſtice.

Punishment is incurred by drinking

IF a perſon be intoxicated by drinking *Nabeez**, puniſhment is incurred by him, becauſe it is related of *Omar* that he decreed puniſhment for wine-drinking upon a wild *Arab*, who was intoxicated by drinking that liquor.—(The puniſhment for drunkenneſs, and the degree of ſcourging in the puniſhment for wine-drinking, ſhall be hereafter explained.)

The *ſmell*

convictic without

dence:

IF the ſmell of wine be diſcovered upon a perſon, or he ſhould vomit wine, yet if witneſſes have not actually *ſeen* him *drinking* it, puniſhment is not incurred, becauſe the ſmell alone leads but to a very uncertain concluſion, as this appearance may proceed either from the perſon having drank wine, or from his having ſat among wine-drinkers, from whom he may have contracted the ſmell;—and it is alſo poſſible that wine may have been adminiſtered to him by *force*, or *menaces*, in which caſe no puniſhment is incurred.

nor *in*

t

proceed from *wine.*

PUNISHMENT for wine-drinking is not incurred by intoxication alone, unleſs it be known that the perſon has been intoxicated by the voluntary drinking of *wine*, or of *Nabeez*, becauſe men are ſometimes inebriated by the uſe of articles which are permitted, ſuch as the juice of *Henbane*, or *mare's milk*; and men may alſo be ſometimes *compelled* to drink wine, which is not a puniſhable offence, when thus committed by *compulſion*.

Puniſhment not to be inflicted during *intoxication*.

PUNISHMENT is not to be inflicted upon a wine-drinker, whilſt he is intoxicated, nor until his intoxication ſhall have ceaſed, in order that the end thereof (namely *determent*) may be obtained.

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* A fermented liquor made by ſteeping *dates*, *raiſins*, &c. in hot water. It is deſcribed particularly in another place.

THE

Puniſhment for wine-drinking to a

The puniſhment of a free perſon, for drinking wine or other intoxicating liquor, is *eighty ſtripes*, on the authority of all the companions; and thoſe eighty ſtripes are to be inflicted in every reſpect under the ſame rules and reſtrictions as in the caſe of whoredom, according to what is mentioned under that head: and (according to the *Rawâyet Maſhhoor*,) the wine-drinker muſt be ſtripped naked to receive his puniſhment. It is recorded from *Mahommed* that the offender muſt *not* be ſtripped, as nothing concerning the puniſhment for wine-drinking occurs in the ſacred writings, wherefore it is expedient, for the ſake of lenity, that a wine-drinker be not ſtripped to receive correction. The reaſon for what is recorded in the *Rawâyet Maſhhoor* is that *one* kind of lenity is already ſhewn in the number of ſtripes preſcribed, thoſe in whoredom being *one hundred*, whereas in wine-drinking there are only *eighty*; hence it is not requiſite that a *ſecond* ſort of lenity be ſhewn in *the mode* of infliction.

and, to a *ſlave*, *forty* ſtripes.

If the drinker of wine be a ſlave, male or female, the puniſhment for wine-drinking, with reſpect to ſuch, is *forty* ſtripes only, becauſe the ſtate of bondage induces only *half* puniſhment, as has been repeatedly mentioned.

Confeſſion may be retracted.

If a perſon make confeſſion to the drinking of wine, or any other intoxicating liquor, and afterwards retract from ſuch confeſſion, puniſhment is not to be inflicted upon him, as the puniſhment of wine-drinking is purely a right of God.

The offence is

Wine-drinking is proved on the teſtimony of two witneſſes; and alſo by confeſſion once made. It is recorded from *Aboo Yooſaf*, that *two* confeſſions are requiſite. But it is to be obſerved that the evidence of women againſt men is not admiſſible in wine-drinking, becauſe the evidence of females is liable to variation, and they may be alſo ſuſpected of abſence of mind, or forgetfulneſs.

Degree of intoxication required to induce puniſhment.

THE degree of intoxication which occaſions puniſhment amounts to this,—that the perſon ſo intoxicated be not able to diſtinguiſh what is ſaid to him in any ſhape;—nor to know a *man* from a *woman*. The compiler of the *Hedáya* obſerves that this is the doctrine of *Haneefa*. The two diſciples have ſaid that the degree of drunkenneſs which induces puniſhment is ſufficiently found in the intoxicated perſon ſpeaking confuſedly and indiſtinctly, as it is from this that drunkenneſs is generally underſtood. Many doctors agree with the two diſciples in this point. The argument of *Haneefa* is that the drinking of wine is among the cauſes of puniſhment, wherefore it is to be noticed only in the *exceſs*; for in acts which are cauſes of puniſhment the *exceſs* of them only is regarded, on account of ſeeking a pretext for the purpoſe of averting puniſhment; and *exceſs* of drunkenneſs appears in the intoxication ſo far overpowering the reaſon as not to leave the perſon a capacity of diſtinguiſhing one object from another.——(In aſcertaining the illegality of intoxication produced by drinking any other liquor than wine, regard is had to what the two diſciples maintain concerning the puniſhment for drunkenneſs produced by *wine*-drinking.)—*Shafeï*, in the puniſhment for drunkenneſs, has regard to the appearance of the effect produced by the wine, in the intoxicated perſon's *walking*, or other actions, by his *ſtaggering* or *turning giddy* when he attempts to walk; but our doctors ſay that ſuch effect may proceed from different cauſes, as they ſometimes do not attend drunkenneſs, and ſometimes occur in other caſes, (ſuch as *weakneſs* for inſtance,) wherefore this ſpecies of effect is not regarded.

Confeſſion of any offence, made during intoxication, is not re-

IF a perſon, during a fit of intoxication, ſhould make confeſſion of any thing which occaſions puniſhment, (ſuch as *whoredom* for inſtance,) no puniſhment is to be inflicted upon him, as in ſuch a confeſſion, there is apprehenſion of falſehood, and this apprehenſion is to be regarded ſo far as to avert puniſhment, ſince puniſhment [*Hidd*] is purely a right of GOD:—it is otherwiſe, however, in puniſhment for *ſlander*; for if a man in a ſtate of intoxication were to make confeſſion of ſlander, puniſhment for ſlander muſt be decreed upon him, becauſe this is not purely a right of God, but is alſo a right of the *individual*, and therefore a ſtate of drunkenneſs is here the ſame as a ſtate of ſobriety, for the ſake of inflicting a *penalty*, in the ſame manner as in all other matters, ſuch as *divorce*, *manumiſſion*, and ſo forth.

nor *apoſtacy*.

If a man, during intoxication, ſhould apoſtatize from the faith, his wife is not thereby divorced from him, becauſe infidelity depends upon what may be a perſon's *belief*, and that cannot be aſcertained during *drunkenneſs*.

CHAP. V.

Of *Hidd Kazaf*, or the *Puniſhment for Slander*.

Definition of *Kazaf*.

Kazaf, in it's primitive ſenſe, ſimply means *accuſation*. By *Kazaf*, in the language of the law, is underſtood a man inſinuating a charge of whoredom againſt a married man or woman; the perſon ſo acting being termed the *Kâzif*, or *ſlanderer*; and the man or woman ſo ſcandalized the *Makzoof*, or *ſlandered*.

Puniſhment

If any perſon expreſsly accuſe of whoredom a man or woman who is married *, in ſuch caſe, if the accuſed require the magiſtrate to paſs ſentence of puniſhment for ſlander upon that perſon, the magiſtrate is bound to order its infliction.

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* Without producing the number of witneſſes requiſite to prove the charge.

ment, to a *freeman*, is *eighty ſtripes*

THE puniſhment for ſlander is *eighty ſtripes*, if the ſlandered be *free*, becauſe GOD has ſo commanded in the *Koran*, ſaying,—"BUT "AS TO THOSE WHO ACCUSE MARRIED PERSONS OF WHOREDOM, "AND PRODUCE NOT FOUR WITNESSES, THEM SHALL YE SCOURGE "WITH FOURSCORE STRIPES." And the conditions upon which this puniſhment is to be inflicted are twofold;—FIRST, That the accuſed make requiſition thereof, becauſe of his right being involved in it, in as much as ſcandal is by that means removed from him;—SECONDLY, That the accuſed be a married man, this being particularly ſpecified in the text already quoted.

It is neceſſary that the eighty ſtripes [or ſtrokes] be inflicted on different parts [or limbs] of the offender, in conformity to what has been already advanced upon that ſubject with reſpect to the puniſhment for whoredom: but it is to be obſerved that the perſon ſuffering this correction is not to be ſtripped naked, becauſe the occaſion of the puniſhment is not abſolutely certified, ſince it is poſſible that the accuſer may have ſpoken truly, for which reaſon it muſt not be inflicted with *ſeverity*, as in puniſhment for *whoredom*. The outer garment or robe, however, together with any clothes which are *ſtuffed* or *quilted*, muſt be removed, becauſe ſuch a covering would prevent a perſon from feeling his puniſhment.

and to a ſla *forty ſtripes.*

IF the accuſer be a *ſlave*, the puniſhment for ſlander with reſpect to him is *forty ſtripes*; as bondage induces only half puniſhment,—according to what has been before repeatedly obſerved upon that head.

Deſcription of a perſon the ſlander

THE *ſtate of marriage* of the ſlandered perſon [which is a requiſite condition of puniſhment to the *ſlanderer*] requires that he niſhment.

he or ſhe be free, of ſound judgment, of mature age, and a *Muſſulman*; and alſo of chaſte repute; that is to ſay,—free from any ſuſpicion of adultery: there are, therefore, five conditions required in it; FIRST,—The *freedom of the accuſed*, becauſe the word of GOD ſays, "UPON THEM," (that is upon female ſlaves) "IS DUE HALF THE "PUNISHMENT THAT IS DUE UPON *Mahſanas*,"—Where the word *Mahſanas*, by the context, implies *free women*, in oppoſition to *ſlaves*, whence it appears that the term *married* [*Mahſan*] here applies only to *free people*;—SECONDLY, *Sanity of intellect*, and, THIRDLY, *Maturity of age*,—becauſe infants and idiots are not liable to be ſcandalized, as whoredom cannot be proved upon ſuch;—FOURTHLY, *Iſlâm*, becauſe the prophet declared, "*A Polytheiſt is not a* MAHSAN:" and FIFTHLY,—*Chaſtity*, becauſe no ſcandal attaches to any other perſons than thoſe who are of chaſte *repute*, and the accuſer of an unchaſte perſon, moreover, ſpeaks truly.

Caſes which conſtitute ſlander.

IF a perſon deny another's parentage, as if he were to ſay to him, "Thou art not the ſon of thy [reputed] father!" ſuch perſon thereby incurs puniſhment for ſlander: this, however, is only where the mother of the perſon thus addreſſed is a *married woman*, becauſe ſuch denial is a poſitive accuſation with reſpect to the mother of that perſon, ſince the legitimacy of a child cannot be denied unleſs it be begotten in whoredom.

IF one perſon, in the heat of paſſion, ſay to another, "Thou art "not the ſon of ſuch-a-one," and the perſon mentioned be his father, and his deſcent be eſtabliſhed as from him, in this caſe the perſon ſo ſpeaking incurs puniſhment for ſlander. But if theſe words be ſpoken in any other circumſtance than the heat of paſſion, puniſhment for ſlander is not incurred by the ſpeaker, becauſe ſuch words, if ſpoken in wrath, imply malicious and wanton abuſe, whereas, if uttered in a calm and deliberate moment, they may mean no more than an upbraiding, by denying any likeneſs between the perſon ſpoken to and his father, in point of goodneſs of diſpoſition, ſuch as *benevolence* and ſo forth.

IF a man ſay to another; " Thou art not the ſon of ſuch-a-one," and it ſhould happen that the perſon named is the *grandfather* of him who is thus addreſſed, the ſpeaker does not incur puniſhment for ſlander, becauſe his aſſertion is literally true. And, in the ſame manner, if a man ſhould declare another to be the ſon of one who is his *grandfather*, he does not thereby incur puniſhment for ſlander, becauſe the child's child is metaphorically referred to the *grandfather*, and is called *his* child.

Caſe of a claim of puniſhment for

IF a man call another " a *ſon of a whore*," and it ſhould happen that the mother of him who is thus addreſſed is dead, and had been a married woman, in ſuch caſe, if he [the ſon] require puniſhment for ſlander to be inflicted upon the ſpeaker, the ſame muſt be inflicted accordingly, becauſe the ſpeaker has ſlandered a married woman after her death. It is to be obſerved, however, that a right to demand puniſhment for ſlander, in behalf of a deceaſed perſon, belongs only to one in whoſe parentage a flaw is created by the imputation, and this is either the *parent* or the *child*, becauſe ſcandal attaches to the child of the accuſed, and hence the ſlander applies to the child alſo in effect. According to *Shafeï*, any heir may demand puniſhment for ſlander in behalf of a perſon deceaſed, becauſe puniſhment for ſlander is held by him to be a matter of *inheritance*, as ſhall be hereafter demonſtrated. According to our doctors, on the other hand, the power of demanding puniſhment for ſlander in behalf of a perſon deceaſed is not in the way of an *inheritance*, but for a reaſon already intimated, that the ſcandal ariſing from the ſlander attaches to the deceaſed;—whence it is that the right to demand puniſhment for ſlander on behalf of a defunct appertains to one who may be excluded from inheritance by the murder of the perſon from whom he inherits; and that it alſo appertains to the child of the *daughter*, in the ſame manner as to the child of the *ſon*, (contrary to the opinion of *Mohammed*;) and alſo, that it appertains to the *child*'s child during the lifetime of the *former*, (contrary to the opinion of *Ziffer*;)—and ſo alſo, that if the deceaſed perſon who was ſlandered were *married*, it is lawful for that perſon's child to demand the puniſhment for ſlander, although ſuch child ſhould be an *infidel*, or a *ſlave*. This laſt is alſo contrary to the opinion of *Ziffer*, who argues that if the right of demanding puniſhment for ſlander, in behalf of a defunct, were to reſt with the child, being an *infidel*, it muſt ſo appertain, either in the manner of an *inheritance*, or on account of his being a *party*, becauſe of the ſlander extending to him *by effect*, (ſince the ſcandal ariſing from it attaches to him;) and both theſe inferences are unſupported; the *firſt*, becauſe puniſhment for ſlander is not a matter of *inheritance*; and the *ſecond*, becauſe, as an expreſs accuſation of whoredom made againſt the child does not induce puniſhment for ſlander, (ſince an infidel cannot be a married perſon in the ſenſe which ſubjects the accuſer to puniſhment,) ſo, in a caſe where the ſlander is eſtabliſhed with reſpect to him *by effect* only, it does not induce puniſhment *a fortiori*.—Our doctors, on the other hand, argue that, in the caſe in queſtion, the ſlanderer, by accuſing a married perſon, has fixed a ſtain upon the child, for which he will ſeek ſatisfaction by puniſhment for ſlander:—the principle upon which this proceeds is that the circumſtance of the accuſed being a *married perſon* is made a condition [of puniſhment upon a ſlanderer] in order that, in the charge of whoredom, the imputation of a ſtain upon him may be completely eſtabliſhed, after which ſuch imputation of a ſtain deſcends to his child; and ſuch is the caſe in the preſent inſtance: and although the child be an infidel, yet infidelity does not prevent *a claim of right*: contrary to a caſe where an expreſs accuſation is advanced againſt the *child himſelf*; for in this caſe puniſhment for ſlander is not incurred, becauſe here the imputation of a ſtain does not completely exiſt, as *marriage* (in the ſenſe which would induce puniſhment for ſlander,) does not exiſt with reſpect to the *accuſed*, on account of his being *an infidel*.

A ſlave cannot demand puniſhment upon his *maſter*; nor a ſon upon his *father*.

A SLAVE is not permitted to demand puniſhment for ſlander upon his maſter,—where the latter has ſlandered his mother, being a married woman;—neither does it belong to a ſon to demand puniſhment for ſlander upon his father,—where the latter has ſlandered his mother, being a married woman;—becauſe a maſter is not liable to any chaſtiſement on account of his ſlave, nor a father on account of his ſon; whence it is that retaliation is not executed upon a father on account of his ſon, nor upon a maſter on account of his ſlave. But if the mother ſhould have another ſon by another father, that ſon may demand puniſhment for ſlander to be inflicted, on behalf of his mother, upon the father aforeſaid, becauſe the occaſion for puniſhment, (namely *ſlander*,) is in that caſe fully eſtabliſhed, and the obſtacle to the demand of it does not exiſt in the perſon who demands it.

The deceaſe of the ſlandered party prevents puniſhment.

IF any perſon accuſe another of whoredom, and the perſon ſo ſlandered die, puniſhment for ſlander is not incurred. *Shafeï* maintains that puniſhment is not to be remitted. And in the ſame manner, if the ſlandered perſon ſhould die after the infliction of *a part* of the puniſhment upon the ſlanderer, the remaining part thereof ceaſes, according to our doctors.—*Shafeï* alleges that it does not ceaſe. This difference of opinion obtains becauſe puniſhment for ſlander is a matter of *inheritance*, according to *Shafeï*, whereas according to our doctors it is not ſo. It is to be obſerved that there is no difference of opinion concerning the puniſhment for ſlander being a right of GOD, and alſo a right of the INDIVIDUAL;—becauſe the puniſhment for ſlander has been ordained by the LAW for the purpoſe of removing ſcandal from the perſon ſlandered, and the advantage reſults ſolely to the ſlandered, on which account, puniſhment for ſlander is a right of the *individual*;—and it has alſo been ordained for the purpoſe of *determent*, (whence puniſhment for ſlander is termed *Hidd*[*],) and the deſign of the inſtitution is to purify the world from ſin, and this demonſtrates that puniſhment for ſlander is a right of God:—ſome of the *rules* in it, moreover, prove puniſhment for ſlander to be a right of the *individnal*, ſuch as that "it cannot be decreed but "where ſome perſon ſues for it," which is a right of an *individual*;—and, on the other hand, ſome of it's rules prove puniſhment for ſlander to be a right of God, ſuch as, that "the exaction of it is committed "to the *magiſtrate*, and not to the *perſon ſlandered*."—In ſhort, in the puniſhment for ſlander there are two contending principles; and ſuch being the caſe, *Shafeï* gives the *firſt* principle the preference, namely, the *right of the individual*, conſidering that as ſuperior to the right of God, the right of the individual being preferable, becauſe of his being neceſſitous, whereas God is not neceſſitous: our doctors, on the other hand, give the *ſecond* principle the preference, and hold it to be the ſuperior, becauſe in whatever degree the right of the creature may be concerned, the Creator is the ſurety, and the guarantee thereof; and hence the converſation of the rights of the individual is therein obtained: but the caſe is not the ſame in the *reverſe* of this propoſition, becauſe there is no authority to exact the right of God, but in the way of a vicarious delegation. Theſe different tenets, as held by each party, are notorious; and from them proceeds a contradiction of opinion reſpecting a variety of caſes in puniſhment for ſlander. Thus, according to *Shafeï*, puniſhment for ſlander is an *inheritance*; but in the opinion of our doctors it is not ſo, as inheritance obtains only in the rights of the *individual*, and not in the rights of God.—Again, the remiſſion of it is not approved by our doctors; but according to *Shafeï* it is approved: and again, it is not lawful to accept of any thing in lieu of puniſhment, according to our doctors; but according to *Shafeï* this is lawful. It is recorded that the opinion of *Aboo Yooſaf* reſpecting remiſſion is the ſame with that of *Shafeï*.

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[*] See the definition of *Hidd* in the beginning of this book.

Confeſſion of ſlander, can-

If a perſon make confeſſion of ſlander, and afterwards retract from ſuch not be retracted.

ſuch confeſſion, his retractation is not to be credited, becauſe, as the right of the ſlandered perſon is therein concerned, it is to be ſuppoſed that he will falſify the retractation:—contrary to ſuch puniſhments as are purely *a right of* GOD, where the retractation muſt be admitted, as there is no perſon concerned to oppoſe the veracity of it.

A term of *abuſe* does not conſtitute *ſlander.*

IF a man were to call an *Arab* a *Nabathean*[*], puniſhment for ſlander is not incurred by him, becauſe he is here ſuppoſed only to ſpeak *comparatively*,—implying merely that the perſon he addreſſes is a *Nabathean* in *badneſs of diſpoſition*, or in want of virtue: and in the ſame manner, if a man were to ſay to an *Arab* "Thou art not an "*Arab*," no puniſhment would follow for the ſame reaſon.

IF a man ſay to another, "O ſon of the rain," he is not a ſlanderer, becauſe theſe words may be conſidered as implying *purity* and *ſoftneſs of manners*, as *rain* is diſtinguiſhed by the qualities of *purity* and *ſoftneſs*.

IF a man, in ſpeaking to another, ſhould declare him to be the ſon of any of his parental relations other than his *father*, ſuch as his maternal or paternal uncle, or his ſtepfather, he is not a ſlanderer, becauſe it is common to beſtow the appellation of *father* upon each of theſe relations, in the ſame manner as upon the *natural parent*.

Equivocal accuſation of whoredom

niſhment for ſlander:

IF a man, being in anger, ſay to another *Zinte-feeal-Jiblee* [†], and ſhould plead that he thereby meant "you climbed up the hill," yet puniſhment for ſlander is to be inflicted on him, according to the two *Elders*. *Mohammed* maintains that puniſhment is not to be inflicted on him, becauſe the word *Zinte* means *aſcending*, in its literal ſenſe, and the mention of *a mountain* proves that ſuch is intended by it. The argument of the two *Elders* is that *Zinte* is uſed to expreſs *whoredom* alſo; and the circumſtance of *anger* proves that by the word *Zinte* whoredom is intended; wherefore puniſhment is to be inflicted, in the ſame manner as if the term *Zinte* had been uſed *without* any mention of a *mountain*, and he were to ſay that by *Zinte* he meant *aſcent*.

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[*] The *Nabatheans* are a tribe upon the confines of *Joâk*, remarkable for the barbarity and ferocity of their manners.

[†] This may be either tranſlated "you *committed whoredom* in the mountain," or "you *aſcended* the mountain," as the term *Zinna* ſignifies not only *whoredom*, but alſo *climbing*, or *aſcending*."

If one man were to ſay to another *Zinte ali-al Jiblee* [*], according to *ſome* doctors puniſhment for ſlander is not incurred by him, becauſe the mention of a *mountain*, in this place, demonſtrates that by *Zinte* he meant *aſcending*; but according to *others*, puniſhment for ſlander is incurred, becauſe a ſituation of *paſſion* and *abuſe* proves the meaning of the ſpeaker to be *whoredom*.

and ſo alſo, *mutual recri-*

If one man ſhould ſay to another "Thou art a whoremonger," and the other ſhould anſwer "nay, but *thou*,"—they both incur puniſhment for ſlander, as attempting each to fix an imputation of whoredom upon the other.

Recrimination between a huſband and wife induces puniſhment for ſlander upon the

If a man ſhould ſay to his wife "Thou adultreſs!" and ſhe ſhould anſwer, ſaying, "Nay, but *thou*!" puniſhment for ſlander is incurred by the woman: and there is no *Laân* in this caſe; becauſe the huſband and wife are both equally accuſers; but the accuſation advanced by a huſband againſt his wife induces *Laân*; and that by a wife againſt her huſband induces *puniſhment for ſlander*; and puniſhment for ſlander is here firſt inflicted upon the woman in order to prevent *Laân*, as a perſon who has ſuffered puniſhment for ſlander is incapable of making *Laân*; for if this arrangement were reverſed,

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[*] Literally, "You aſcended *upon* the mountain," or, "You have committed whoredom *upon* the mountain." The word *Alee* [upon] is the only difference between this and the preceding caſe.

(that is to ſay, if the *Laân* were previouſly required of the woman,) neither the *Laân* nor the puniſhment would drop: the puniſhment, therefore, is to be firſt inflicted, in order that *Laân* may be prevented; for it is laudable to ſeek a remedy by which *Laân* may be avoided, becauſe that is alſo puniſhment in effect*. But if the wife, in the example here recited, were to reply to her huſband, "I have com-"mitted adultery with you," in this caſe there is neither puniſhment for ſlander, nor *Laân*; for there is a doubt concerning both puniſhment and *Laân*, as it is poſſible that the woman may allude to a fact of whoredom committed before marriage, in which caſe puniſhment for whoredom would be incurred by the woman, and not *Laân*, ſhe having, by her reply, confirmed the aſſertion of her huſband, in thus imputing whoredom to him; but by the huſband nothing would be incurred, as he does not confirm her aſſertion: and on the other hand, it is alſo poſſible that ſhe may allude to carnal connexion after marriage, as if ſhe were to ſay, [in explanation,]— "My adultery conſiſted in your having connexion with me, after our "marriage, againſt my will," (and this, in ſuch a ſituation †, is the moſt probable meaning of her words,) in which caſe *Laân* would be incumbent upon the woman, and puniſhment for ſlander would not be incurred by her, as the accuſation is made by the *huſband*, and not by the *wife*: and in conſequence of theſe two contradictory poſſibilities, a doubt exiſts equally with reſpect to *Laân* and *puniſhment for ſlander*; wherefore neither is to be inſiſted on.

Caſe of acknowledgment

IF a man ſhould have acknowledged a child born of his wife, and ſhould afterwards deny it, in this caſe *Laân* is incumbent, becauſe the

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* And if the wife were firſt required to make *Laân*, and the puniſhment for ſlander (which the *Laân* would not prevent,) were afterwards inflicted on both parties, ſhe would (by this mode of proceeding) ſuffer, in effect, *two puniſhments*, which is unlawful. To underſtand this rightly it is neceſſary to remark that the impoſition of an oath is conſidered as a *violence* or *hardſhip* amounting to *puniſhment*.

† Of *recrimination* and *ſcolding*.

parentage

child, and ſubſequent denial.

parentage of the child has been eſtabliſhed in him by his previous acknowledgment, and by his ſubſequent denial an accuſation is implied with reſpect to his wife, who is the mother of the child; he muſt therefore make *Laán*. But if he ſhould *firſt* deny the child, and *afterwards* acknowledge it, in this caſe puniſhment for *ſlander* is to be inflicted upon him, becauſe when he thus falſifies, *Laán* is prevented, as *Laán* is a ſort of puniſhment impoſed from the neceſſity of the caſe, owing to a mutual falſification *, in which puniſhment for ſlander is the original thing, and hence, in a caſe where the mutual falſification is done away †, that which is the original muſt be put in force. The parentage alſo of the child is eſtabliſhed in this man, in both theſe caſes, ſince he has acknowledged it, whether ſuch acknowledgment be made *before* denial, as in the *former* inſtance, or *after* denial, as in the *latter*.

Objection.—In the former inſtance, upon *Laán* becoming incumbent, it ſhould follow that the parentage of the child is not eſtabliſhed.

Reply.—Baſtardy is not a neceſſary conſequence of *Laán*, for *Laán* may be impoſed without baſtardizing the child, in the ſame manner as where a man denies a child after a long lapſe of time from the period of the birth, in which caſe *Laán* is incumbent, and the child is not baſtardized, but its parentage remains eſtabliſhed;—as, on the contrary, a child may be baſtardized in a caſe in which *Laán* is not incumbent; as where a huſband denies a child born of his wife, who is a ſlave, in which caſe the child is baſtardized, but *Laán* is not incumbent ‡.

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* Where the wife denies the huſband's aſſertion, and the huſband denies the chaſtity of his wife.

† By one of the parties confeſſing the other to be in the right; as the huſband here does, by acknowledging the child after having denied it.

‡ Owing to the wife being a *ſlave*.

IF a man were to ſay to his wife "'This is neither *my* child, nor "yet *yours*," in this caſe *Laán* is not incumbent, nor is puniſhment for ſlander due, as the huſband here merely denies the child being born of his wife, and a huſband is not a ſlanderer by ſuch denial.

IF a man accuſe of whoredom a woman who has children, the father of whom is unknown,—or if he ſhould ſo accuſe a woman who has made *Laán*, in conſequence of any of her children having been denied [by her huſband], whether ſuch children be living or not,—in neither of theſe caſes is puniſhment for ſlander incurred, becauſe the *ſigns* of whoredom are found with the woman, namely her *children*, who are without any acknowledged father: the reputation of this woman is therefore queſtionable, on account of theſe ſigns; and *perfect chaſtity of repute* in the accuſed is one condition of puniſhment for ſlander being incurred by the accuſer. But if a man were to accuſe of whoredom a woman who has made *Laán* in conſequence of an imputation of adultery made againſt her by her huſband, and *not* on account of his denial of her children, in this caſe puniſhment for ſlander is to be inflicted upon the accuſer, ſince here no ſigns of whoredom are found with the woman.

Accuſation of a woman who has children deſtitute of any [illegible] ledged father is not *ſlander.*

IF a man have unlawful commerce with a woman in whom he has no right of cohabitation *, puniſhment for ſlander is not to be inflicted upon his accuſer, becauſe *chaſtity of repute* is not applicable to the accuſed, (and this is conditional to his being *married*, in the ſenſe which induces puniſhment for ſlander upon the accuſer,)—and alſo, becauſe the accuſer in this inſtance ſpeaks *truly*.

Accuſation

IT is to be obſerved as a rule, that puniſhment for ſlander is not incurred by the accuſation of any perſon guilty of ſuch a carnal conjunction

under certain reſtrictions.

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* There are many caſes of this deſcription which do not amount to *whoredom*, as may be ſeen under the head of *Erroneous Connexion*, &c.

junction as is in its own nature unlawful, becauſe the term *whoredom* [*Zinna*] ſignifies a carnal conjunction of this deſcription :—but where a perſon forms ſuch a carnal connexion as is unlawful on *ſome other* account, puniſhment for ſlander is incurred by the accuſation of him, as a carnal conjunction of this deſcription is not *whoredom.*—The connexion of a man with a woman who is not his property in any ſhape whatever, (ſuch as a *ſtrange* woman,) or with one in whom he has no property in ſome one ſhape, (as in a *partnerſhip ſlave*, for inſtance,) is unlawful in its own nature ; ſo alſo is his connexion with a woman who is his ſlave, but who is one with whom cohabitation is unlawful to him by a *perpetual illegality*, (ſuch as his *foſter ſiſter* ;) but his connexion with a ſlave with whom cohabitation is unlawful to him by ſuch an illegality as is not of a *perpetual* nature, (as in the caſe of one with whoſe *ſiſter* he cohabits, either as his *wife*, or as his *ſlave*,) is unlawful, on *another* account [*]. *Aboo Haneefa*, (in the caſe of *illegal* cohabitation under a *perpetual* illegality,) makes it a condition [†] that the perpetual illegality be univerſally admitted and eſtabliſhed upon the authority of the moſt generally accepted traditions, ſo as to be determined and known beyond all *doubt* or *diſpute :* for example, if a man were to accuſe another, who had carnal connexion with a *partnerſhip female ſlave*, in this caſe puniſhment for ſlander is not to be inflicted upon the accuſer, becauſe the accuſed appears to have committed the act with one who is his property in *one* ſhape, but not in *another.* But if a man were to accuſe a perſon who has cohabited with his female ſlave, being a *Pagan*, or with his own wife during her courſes, or with his *Mokâtiba*, puniſhment for ſlander is incurred by the accuſer, becauſe here the illegality (ſuppoſing the exiſtence of the *right of property*,) is merely of a *temporary* nature, continuing only until the removal of thoſe obſtacles, (namely *Paganiſm*, or the *courſes*, or the contract of *Kitabut*;)—this illegality, therefore, is illegality on *another* account, and hence the act is not *whoredom*. It is recorded from *Aboo Yooſaf* that the carnal conjunction of a man with his *Mokâtiba* occaſions the deſtruction of *Ihſân* in him; and ſuch is alſo the opinion of *Ziffer*, becauſe a *Mokâtiba* is not her owner's *property* in reſpect to *carnal enjoyment*, (whence it is that if a maſter commit that act with his *Mokâtiba*, he becomes reſponſible for her *Akir*:*)—our doctors, on the other hand, obſerve that the perſon of the *Mokâtiba* is the property of her maſter, but that the enjoyment thereof (with reſpect to the *maſter*) is illegal on *another account* †, ſince it is an illegality which continues only until ſuch time as the *Mokâtiba* appears unable to pay her ranſom, or the contract of *Kitâbat* be broken.—If a man accuſe a perſon who has had carnal connexion with his *female ſlave*, being his *foſter ſiſter*, puniſhment for ſlander is not due upon the accuſer, becauſe carnal connexion with this ſlave is prohibited to the maſter by a *perpetual illegality:* and this is approved doctrine.

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[*] That is to ſay, although it be not unlawful in *its own nature*, yet it is made ſo by *circumſtances:* but this is not a *perpetual* illegality, as the prohibition (in the inſtance here cited) would be removed by the death or other means of removal of the ſiſter: contrary to *perpetual* illegality, which exiſting in the *ſubject herſelf*, can by no means be removed.

[†] Of the act amounting to whoredom.

IF a perſon accuſe a deceaſed *Mokâtib* who may have left effects ſufficient to diſcharge his ranſom, yet puniſhment for ſlander is not due upon the accuſer, becauſe here is a doubt with reſpect to the *perfect freedom* of the *Mokâtib*, the companions differing in opinion upon this point.

IF a perſon accuſe a *Muſſulman* convert, who, whilſt yet a *Pagan*, or a
had married his *mother*, puniſhment for ſlander is to be inflicted upon the accuſer, according to *Haneefa*;—but the two diſciples allege that it is *not* due. The foundation of this difference of opinion is that the marriage of a *Pagan* with his own mother is approved among

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* Meaning the portion which is to be paid to her in the manner of a *dower*.

† That is, not in *its own nature*, but occaſioned by *circumſtances*.

the *Pagans*, according to *Haneefa*,—but the diſciples hold that it is *not* approved; as was explained at large in the book of *Marriage*.

incurred by an *infidel* who ſlanders a *Muſſulman*.

If an infidel, reſiding under protection in a *Muſſulman* ſtate, ſhould accuſe a *Muſſulman*, puniſhment for ſlander is incurred by him, becauſe, in puniſhment for ſlander, the rights of the *individual* are concerned, and the protected infidel has undertaken to pay a due obſervance to the rights of individuals, ſince, as he himſelf deſires to be ſcreened from injury, it follows that he undertakes that he will not offer injury to others; and alſo, that he ſubjects himſelf to the conſequence, if he ſhould do ſo.

A *Muſſulman* ſuffering puniſhment for ſlander, is incapacited from being a *witneſs*:

If puniſhment for ſlander be inflicted upon a *Muſſulman*, his evidence cannot afterwards be received, although he ſhould repent.—*Shafeï* alleges that, in caſe of *repentance*, the credibility of his evidence is reſtored. This point will be further explained in treating of *Evidence*.

and an *infidel* alſo, (with re-

If an infidel ſuffer puniſhment for ſlander, his evidence becomes inadmiſſible, not only with reſpect to *Muſſulmans*, but alſo with reſpect to *Zimmees*,—becauſe competency in evidence appertained to him with reſpect to all of his own deſcription, (namely, *Zimmees*,) but his evidence is thenceforth to be rejected,—rejection of evidence being one of the conſequences of puniſhment for ſlander.—But if this infidel ſhould be afterwards converted to the faith, his evidence then becomes admiſſible with reſpect to *both* claſſes, (that is, both *Muſſulmans* and *Zimmees*,) becauſe, upon his embracing the faith, he obtains, *de novo*, a competency in evidence which did not before exiſt*, and the rejection of which, therefore, is not a conſequence of the puniſhment for ſlander: contrary to where a ſlave ſuffers puniſhment for ſlander, and is afterwards emancipated; for here his evidence ſtill continues inadmiſſible, ſince, as he was not competent to appear *at all* as a witneſs, during his *ſlavery*, ſo as that the rejection * of his evidence might be the conſequence of his having ſuffered puniſhment for ſlander, this circumſtance will operate to that effect after his emancipation.

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* Namely with reſpect to *Muſſulmans*.

Caſe of an in-

faith during infliction of puniſhment.

IF a ſingle ſtroke be inflicted on an infidel on account of ſlander, and he ſhould then embrace the faith, and the remainder of the puniſhment be afterwards inflicted, in ſuch caſe his evidence is admiſſible, becauſe the rejection of evidence is the means of rendering puniſhment entire and complete, and is therefore a *manner* of puniſhment; but as the degree of puniſhment inflicted after his having embraced the faith is only a *partial correction*, and not what can be properly termed *puniſhment*, the rejection of evidence is not to be conſidered as a *manner* of it †.—It is recorded from *Aboo Yooſaf* that his evidence muſt for the future be rejected, becauſe the degree of puniſhment inflicted ſubſequent to his converſion is the *greater* proportion of it, and the *ſmaller* is a dependent of the *greater*. But the former is the more approved doctrine.

A ſingle

the previous *repetitions* of *whoredom* or

ing;

IF a man commit whoredom at ſeveral different times, or repeatedly drink wine, and the puniſhment for either be afterwards inflicted, the ſingle puniſhment, in either inſtance, is conſidered as anſwering to all the repetitions of offence; and ſo alſo, if a perſon were repeatedly guilty of ſlander, and puniſhment for ſlander be afterwards inflicted on him. The ground of this, in the caſe of *whoredom* and *wine-drinking*, is that the puniſhment in both theſe inſtances is purely a right of God, and the deſign, in the infliction of it, is to deter people from the perpetration of ſuch offences; and a probability of this end being obtained is eſtabliſhed by a ſingle infliction of puniſhment, wherefore the obtaining of it by *another* infliction of puniſhment is dubious *; and hence puniſhment cannot be inflicted a ſecond time, becauſe of this doubt: contrary to where a perſon commits whoredom, and is alſo guilty of *ſlander*, and of *wine-drinking*, for in this caſe a puniſhment is to be inflicted ſeparately for every diſtinct ſpecies of offence, becauſe each of theſe acts is of a nature different from either of the other two, and the deſign of each of them is different, wherefore, in the puniſhment of ſuch acts there cannot be any coaleſcence: and with reſpect to *ſlander*, in the puniſhment of it the right of God is held by our doctors to be predominant, whence the ſame arguments apply to it as to *whoredom* and *wine-drinking*. *Shafeï* maintains that, in the caſe of *repetition* of ſlander, if the ſlandered perſon be different, (as if the firſt perſon ſlandered were *Zeyd* and the ſecond *Amar*) or, if the perſon with whom the ſlandered is accuſed be different, (as if a man were to accuſe *Zeyd* of whoredom firſt with one woman and afterwards with another,) in this caſe there is no coaleſcence of puniſhment, but for each ſlander a ſeparate puniſhment muſt be inflicted; for according to *Shafeï*, in the puniſhment for ſlander, the right of the *individual* is predominant.

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* Meaning the *inadmiſſibility*.

† This ſtrange ſophiſtry turns entirely upon the meaning of the term *Hidd*, which is defined to be a certain ſtated correction *completely executed*, any thing ſhort of this not being *Hidd* [puniſhment], but only

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* Becauſe having been, probably, already obtained, it is, (in that caſe) impoſſible that it ſhould be obtained a *ſecond* time.

CHAP. VI.

Of *Tazeer*, or *Chaſtiſement* *.

Definition of the term.

TÂZEER, in its primitive ſenſe, means *prohibition*, and alſo *inſtruction*; in *law* it ſignifies an infliction undetermined in its degree by the LAW, on account of the right either of GOD, or of the *individual*; and the occaſion of it is any offence for which *Hidd* (or *ſtated puniſhment*) has not been appointed; whether that offence conſiſt in *word* or *deed*.

Chaſtiſement is ordained by the LAW;

CHASTISEMENT is ordained by the LAW, the inſtitution of it being eſtabliſhed on the authority of the *Koran*, where GOD enjoins men to chaſtiſe their wives, for the purpoſe of correction and amendment; and the ſame alſo occurs in the traditions. It is moreover recorded that the prophet chaſtiſed a perſon who had called another *perjured*; and all the companions agree concerning this. Reaſon and analogy moreover both evince that chaſtiſement ought to be inflicted for acts of an offenſive nature [†], in ſuch a manner that men may not become habituated to the commiſſion of ſuch acts; for if they were, they might by degrees be led into the perpetration of others more atrocious. It is alſo written in the *Fatâvee Timoor-Taſhee* of *Imâm Sirukhſh*, that in *Tâzeer*, or *chaſtiſement*, nothing is fixed or determined, but

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[*] It is difficult to ſeparate the ideas of *chaſtiſement* and *puniſhment*.—The LAW, however, conſiders them as being eſſentially diſtinct, ſince the degree of *Hidd* (or *puniſhment*) is ſpecified by the LAW itſelf, whereas, *Tazeer* (which for diſtinction's ſake we render *chaſtiſement*) is committed to the diſcretion of the magiſtrate, and for this reaſon it is elſewhere rendered *diſcretionary correction*.

[†] Meaning petty offences.

that the degree of it is left to the diſcretion of the *Kâzee*, becauſe the deſign of it is *correction*, and the diſpoſitions of men with reſpect to it are different, ſome being ſufficiently corrected by *reprimands*, whilſt others, more obſtinate, require *confinement*, and even *blows*.

and is of four *orders*, or *degrees*.

In the *Fatâvee Shafee* it is ſaid that there are four orders or degrees of chaſtiſement;—FIRST, the chaſtiſement proper to the *moſt noble of the noble*,—(or, in other words, princes, and men of learning,) which conſiſts merely in *admonition*, as if the *Kâzee* were to ſay to one of them, "I underſtand that you have done thus, or thus," ſo as to make him aſhamed;—SECONDLY, the chaſtiſement proper to the *noble*, (namely commanders of armies, and chiefs of diſtricts,) which may be performed in two ways, either by admonition, (as above,) or by *Jirr*, that is by dragging the offender to the door and expoſing him to ſcorn;—THIRDLY, the chaſtiſement proper to the *middle order*, (conſiſting of merchants and ſhop-keepers,) which may be performed by *Jirr*, (as above,) and alſo by *impriſonment*; and FOURTHLY, the chaſtiſement proper to the loweſt order in the community, which may be performed by *Jirr*, or by *impriſonment*, and alſo by *blows*.

Chaſtiſement

It is recorded from *Aboo Yooſaf* that the ſultan may inflict chaſtiſement by means of *property*,—that is, by the exaction of a ſmall ſum in the manner of a *fine*, proportioned to the offence; but this doctrine is rejected by many of the learned.

Chaſtiſement may be in*any* perſon.

IMÂM-TIMOOR-TÂSHEE ſays that chaſtiſement, where it is incurred purely as the right of GOD *, may be inflicted by any perſon whatever; for *Aboo Jâſir Hindooânee*, being aſked whether a man, finding another in the act of adultery with his wife, might ſlay him, replied, "If the huſband know that expoſtulation and beating will "be ſufficient to deter the adulterer from a future repetition of his "offence, he muſt not ſlay him; but if he ſee reaſon to ſuppoſe "that nothing but death will prevent a repetition of the offence, in "ſuch caſe it is allowed to the huſband to ſlay that man; and if the "woman were conſenting to his act, it is allowed to her huſband "to ſlay her alſo;"—from which it appears that any man is empowered to chaſtiſe another by *blows*, even though there be no magiſtrate preſent. He has demonſtrated this fully in the *Moontaſſee*; and the reaſon of it is that the chaſtiſement in queſtion is of the claſs of *the removal of evil with the hand*, and the prophet has authoriſed every perſon to *remove evil with the hand*, as he has ſaid "*Whoſoever "among ye ſee the evil, let him remedy it with his own hands*; "*but if he be unable ſo to do, let him forbid it with his tongue*,"—(to the end of the ſpeech.)—*Chaſtiſement*, therefore, is evidently contrary to *puniſhment*, ſince authority to inflict the latter does not appertain to any but a magiſtrate or a judge.—This ſpecies of chaſtiſement is alſo contrary to the chaſtiſement which is incurred on account of the right of the *individual*, (ſuch as in caſes of *ſlander*, and ſo forth,) ſince that depends upon the complaint of the injured party, whence no perſon can inflict it but the magiſtrate, even under a *private arbitration*, where the plaintiff and defendant may have referred the deciſion of the matter to any *third perſon*.

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* That is, where it is incurred by an offence committed merely againſt the LAW, and not affecting *an individual*.

CHASTISEMENT, in any inſtance in which it is authoriſed by the LAW, is to be inflicted where the *Imám* ſees it adviſeable.

It is to be inflicted wherever it is authoriſed.

IF a perſon accuſe of whoredom a male or female ſlave, an *Amılid*, or an infidel, he is to be chaſtiſed, becauſe this accuſation is an *offenſive* accuſation, and puniſhment for ſlander is not incurred by it, as the *condition*, namely *Ihſán*, (or marriage in the ſenſe which induces puniſhment for ſlander,) is not attached to the accuſed: chaſtiſement therefore is to be inflicted. And in the ſame manner,

Chaſtiſement is due for

if any perſon accuſe a *Muſſulman* of any other thing than *whoredom*, (that is, abuſe him, by calling him a *reprobate*, or a *villain*, or an *infidel*, or a *thief*,) chaſtiſement is incurred, becauſe he injures a *Muſſulman*, and defames him; and puniſhment [*Hidd*] cannot be conſidered as due from analogy, ſince analogy has no concern with the neceſſity of puniſhment: chaſtiſement therefore is to be inflicted. Where the aggrieved party is a *ſlave*, or ſo forth, the chaſtiſement muſt be inflicted to the *extremity* of it: but in the caſe of abuſe of a *Muſſulman*, the meaſure of the chaſtiſement is left to the diſcretion of the magiſtrate, be it more or leſs; and whatever he ſees proper let him

It is not incurred by calling a *Muſ-* an *aſs*,

If a perſon abuſe a *Muſſulman*, by calling him an *aſs*, or a *hog*, in this caſe chaſtiſement is not incurred, becauſe theſe expreſſions are in no reſpect defamatory of the perſon towards whom they are uſed, it being evident that he is neither an *aſs* nor a *hog*. Some allege that, in *our* times, chaſtiſement is inflicted, ſince, in the *modern* acceptation, calling a man an *aſs* or a *hog* is held to be abuſe.—Others again allege that it is eſteemed ſuch only where the perſon towards whom ſuch expreſſions are uſed happens to be of *dignified rank* (ſuch as a *prince*, or a *man of letters*,) in which caſe chaſtiſement muſt be inflicted upon the abuſer, as by ſo ſpeaking he expoſes that perſon of rank to contempt; but if he be only a *common* perſon, chaſtiſement is not incurred: and our author remarks that this is the moſt approved

The degree of it is from

The *greateſt* number of ſtripes, in chaſtiſement, is *thirty-nine*; and the *ſmalleſt* number is *three*. This is according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* ſays that the greateſt number of ſtripes, in *chaſtiſement*, is *ſeventy-five*. The reſtriction to *thirty-five* ſtripes is founded on a ſaying of the prophet, "*The man who ſhall inflict ſcourging to the amount of* PUNISHMENT, *in a caſe where* PUNISHMENT *is not eſtabliſhed, ſhall be accounted an* AGGRAVATOR," (meaning, a wanton aggravator of puniſhment,) from which ſaying it is to be ferred that the infliction of a number of ſtripes, in *chaſtiſement*, to the ſame amount as in *puniſhment*, is unlawful; and this being admitted, *Haneefa* and *Mohammed*, in order to determine the utmoſt extent of *chaſtiſement*, conſider what is the *ſmalleſt* puniſhment; and this is puniſhment for ſlander with reſpect to a ſlave, which is *forty ſtripes*; they therefore deduct therefrom *one ſtripe*, and eſtabliſh *thirty-nine* as the greateſt number to be inflicted in *chaſtiſement*. *Aboo Yooſaf*, on the other hand, has regard to the ſmalleſt puniſhment with reſpect to *freemen*, (as freedom is the original ſtate of man,) which is eighty ſtripes; he therefore deducts five, and eſtabliſhes ſeventy-five as the greateſt number to be inflicted in chaſtiſement as aforeſaid, becauſe the ſame is recorded of *Alee*, whoſe example *Aboo Yooſaf* follows in this inſtance. It is in one place recorded of *Aboo Yooſaf* that he deducted only *one* ſtripe, and declared the utmoſt number of ſtripes, in *chaſtiſement*, to be *ſeventy-nine*. Such, alſo, is the opinion of *Ziffer*; and this is agreeable to analogy [*].——*Mohammed*, in his book [†], has determined the ſmalleſt number of ſtripes in chaſtiſement to *three*, becauſe in fewer there is no chaſtiſement. Our modern doctors aſſert that the ſmalleſt degree of chaſtiſement muſt be left to the judgment of the *Imám*, or *Kâzee*, who is to inflict whatever he may deem ſufficient for chaſtiſement, which is different with reſpect to different men. It is recorded of *Aboo Yooſaf* that he has alleged that the degree thereof is in proportion to the degree of the offence; and it is alſo recorded from him that the chaſtiſement for petty offences ſhould be inflicted to a degree approaching to the puniſhment allotted for offences of a ſimilar nature; thus the chaſtiſement for libidinous acts, (ſuch as *kiſſing* and *touching*,) is to be inflicted to a degree approaching to puniſhment for *whoredom*; and the chaſtiſement for *abuſive language*, to a degree approaching to puniſhment for *ſlander*.

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[*] Becauſe, in all other caſes the deduction of *one* from the whole number is ſufficient to reduce the thing from an higher to a lower claſs.

[†] Meaning the *Mabſoot*.

Impriſonment may be added to *ſcourging.*

If the *Kázee* deem it fit, in chaſtiſement, to unite *impriſonment* with ſcourging, it is lawful for him to do both, ſince impriſonment is of itſelf capable of conſtituting chaſtiſement, and has been ſo employed, for the prophet once impriſoned a perſon by way of chaſtiſing him. But as impriſonment is thus capable of conſtituting chaſtiſement, in offences where chaſtiſement is incurred by their being eſtabliſhed, impriſonment is not lawful before the offence be proved, merely upon *ſuſpicion*, ſince impriſonment is in itſelf a chaſtiſement: contrary to offences which induce puniſhment, for there the accuſed may be lawfully impriſoned upon ſuſpicion, as *chaſtiſement* is ſhort of *puniſhment*; (whence the ſufficiency of impriſonment *alone* in chaſtiſement;) and ſuch being the caſe, it is lawful to unite *impriſonment* with *blows.*

The blows or ſtripes may be [illegible] from the moſt *lenient* to the *ſevereſt* degree.

The ſevereſt blows or ſtripes may be uſed in chaſtiſement, becauſe, as regard is had to lenity with reſpect to the *number* of the ſtripes, lenity is not to be regarded with reſpect to *the nature* of them, for otherwiſe the deſign would be defeated; and hence, lenity is not ſhewn, in chaſtiſement, by inflicting the blows or ſtripes upon *different* parts or members of the body. And next to *chaſtiſement*, the ſevereſt blows or ſtripes are to be inflicted in puniſhment for *whoredom*, as that is inſtituted by the word of God in the *Koran.* Whoredom, moreover, is a deadly ſin, inſomuch that lapidation for it has been ordained by the law. And next to puniſhment for *whoredom*, the ſevereſt blows or ſtripes are to be inflicted in puniſhment for *wine-drinking*, as the occaſion of puniſhment is there fully certified: and next to puniſhment for *wine-drinking*, the ſeverity of the blows or ſtripes is to be attended to in puniſhment for *ſlander*, becauſe there is a doubt in reſpect to the *occaſion* of the puniſhment, (namely, the *accuſation*,) as an accuſation may be either falſe or true; and alſo, becauſe *ſeverity* is here obſerved, in diſqualifying the ſlanderer from appearing as an evidence; wherefore ſeverity is not alſo to be obſerved in the *nature* of the blows or ſtripes.

If a perſon die, in conſequence of

If the magiſtrate inflict either *puniſhment* or *chaſtiſement* upon a perſon, and the ſufferer ſhould *die* in conſequence of ſuch puniſhment or chaſtiſement, his blood is *Hiddir*; that is to ſay, nothing whatever is due upon it; becauſe the magiſtrate is authoriſed therein, and what he does is done by decree of the LAW; and an act which is decreed is not reſtricted to the condition of *ſafety*. This is analogous to a caſe of *phlebotomy*;—that is to ſay, if any perſon deſire to be let blood, and ſhould die, the operator is in no reſpect reſponſible for his death; and ſo here alſo. It is, contrary, however, to the caſe of a huſband inflicting chaſtiſement upon his wife; for his act is reſtricted to ſafety, as it is only *allowed* to a huſband to chaſtiſe his wife; and an act which is only *allowed* is reſtricted to the condition of *ſafety*, like walking upon the highway. *Shafeï* maintains that, in this caſe, the fine of blood is due from the public treaſury; becauſe, although where *chaſtiſement* or *puniſhment* prove deſtructive, it is *Kattl Khota*, or *homicide by miſadventure*, (as the intention is not the *deſtruction*, but the *amendment* of the ſufferer,) yet a fine is due from the public treaſury, ſince the advantage of the act of the magiſtrate extends to the public at large, wherefore the atonement is due from their property, namely from the *public treaſury*. Our doctors, on the other hand, ſay that whenever the magiſtrate inflicts *a right of* GOD upon any perſon, by the decree of GOD, and that perſon dies, it is the ſame, as if he had died by *the viſitation of* GOD, without any viſible cauſe; wherefore there is no reſponſibility for it.

HEDAYA;

BOOK VIII.

Of *SÂRAKA*, or *LARCINY.*

Chap. I. Introductory.

Chap. II. Of Thefts which occaſion Amputation, and of Thefts which do not occaſion it.

Chap. III. Of *Hirz*, or *Cuſtody*, and of taking away property thence.

Chap. IV. Of the Manner of cutting off the Limb of a Thief, and of the Execution thereof.

Chap. V. Of the Acts of a Thief with reſpect to the Property ſtolen.

Chap. VI. Of *Katta-al-Tareek*, or Highway Robbery.

CHAP. I.

Definition of *Sâraka.*

SÂRAKA literally means *the ſecretly taking away of another's property.* In the language of the law it ſignifies the taking away the property of another in a ſecret manner, at a time when ſuch property is *in cuſtody*,—that is, when the effects are in ſuppoſed ſecurity from the hands of other people; and where the *value* is not leſs than ten *dirms*, and the effects taken the undoubted property of ſome other than of him who takes them.

CUSTODY is of two kinds; FIRST, cuſtody by *place*, that is, by means of ſuch a *place* as is generally uſed for the preſervation of property, as a *houſe*, or a *ſhop*; SECONDLY, by *perſonal guard*, that is, by means of a *perſonal watch* over the property.

ſonal.

Definition of the *ſecrecy* requiſite to conſtitute *theft*.

THE primitive ſenſe of *Sâraka*, or (*larciny*, namely, *ſecretly taking away*,) includes, (in a *legal* view,) the *beginning* and *end* of the tranſaction, where the theft is committed in the *day-time*,—but the *beginning* only, where the theft is committed during the *night*, when the thief ſecretly breaks into the houſe, and then takes away the property by open violence. The reaſon of this is that many thefts are committed during the *night*, by the thief *forcibly* carrying away the property, as at that time the injured perſon cannot obtain any aſſiſtance. If, therefore, the circumſtance of the thief's *ſecretly breaking into* the place of cuſtody, or houſe of the proprietor, were not ſufficient to eſtabliſh a charge of *theft*, puniſhment would in many inſtances be prevented: contrary to where the theft is committed during the *day-time*; for as the injured perſon can then obtain aſſiſtance, thefts are never attempted by open violence, at that ſeaſon; and hence, in the eſtabliſhment of a theft committed during the *day-time*, the *ſecretly taking away* includes both the *beginning* and the *end* of the tranſaction.

IN the greater ſpecies of larciny, (namely *highway robbery*) the *ſecretly taking away* is with reſpect to the *Imâm*, whoſe duty it is to guard the highways by means of his aſſiſtants: in the inferior ſpecies, it is with reſpect to the proprietor, or the perſon who ſtands as his ſubſtitute.

Value of a theft, to induce puiſhment muſt be

If an adult, of ſound underſtanding, ſteal out of undoubted cuſtody ten *dirms*, or property to the value of ten *dirms*, the law awards the amputation of his hand, God having ſaid in the *Koran*, "If a man "or woman steal, cut off their hands:" but regard muſt be had to the conditions of ſanity of intellect, and maturity of age; becauſe independent of theſe criminality cannot be eſtabliſhed, and amputation is the reward of criminality. It is alſo requiſite that the property ſtolen be of importance, and not of trifling or inſignificant value; becauſe men do not covet property of a trifling nature; nor do perſons take ſuch property *ſecretly*, but *openly*; wherefore that which conſtitutes larciny *, (namely, *ſecretly taking away*,) does not exiſt in taking property of a *trifling* nature, nor does any occaſion for *determent* appear therein, as determent is regarded only in matters of frequent occurrence: beſides, the theft of mere *trifles* is uncommon, becauſe they are little coveted. It is therefore requiſite that the property for the theft of which the hand of the thief is ſtruck off, be of value and importance.—Concerning the *amount* of the value there are various opinions: according to our doctors it is *ten dirms:* according to *Shafeï* it is the fourth of a *deenâr*; in the opinion of *Málik* it is *three dirms*. The argument of *Málik* and *Shafeï* is that, in the time of the prophet, amputation was inflicted for the theft of any article of the value of a ſhield: now the loweſt value of a ſhield, upon record, is three *dirms*; and regard muſt be had to the *loweſt*, as that is preciſely aſcertained. *Shafeï* alſo obſerves that the value of the *deenâr*, in the time of the prophet, was eſtimated at *twelve dirms*, the fourth of which is *three dirms*. Our doctors argue that, in this particular, regard ought to be had to the *higheſt* ſtandard, (as this is ſeeking a means to ward off the infliction of puniſhment,) becauſe in *leſs* there is a doubt concerning the criminality; and *doubt* operates to the prevention of puniſhment. A corroberation of this tenet of our doctors is found in a precept of the prophet, viz. "*There is*

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* *Arab. Raknal Sáraka*, that is, the *pillar* of larciny.

"*no amputation for leſs than a* DEENÂR, *or* TEN DIRMS *." It is to be obſerved that the term *dirm* is cuſtomarily uſed to expreſs *coin*, from which it appears that the property ſtolen muſt be ten coined *dirms*, or ſomething to the value of ten coined *dirms*, being the ſame as is mentioned in the treatiſe of *Kadooree*, and alſo in the *Zâhir Rawâyet*; and this is the moſt approved doctrine, as herein regard is had to the completeneſs of criminality.—If, therefore, a perſon were to ſteal to the weight of ten *dirms* of ſilver, uncoined, and it fall ſhort, in value, of ten coined *dirms*, amputation is not incurred by him. In the *weight* of the *dirm* the *ſeptimal weight* is regarded, [that is, in the proportion of ſeven *Miſkals*, or 10½ drams, to the *dirm*,] as this is the uſual weight of it in all countries. What was before advanced—"*or property to the value of ten dirms*," means that any thing elſe is to be valued by *dirms*, although it conſiſt of *gold*.—It is alſo an indiſpenſable requiſite that the property be taken out of a cuſtody reſpecting which there is no doubt, ſince any doubt concerning that circumſtance would occaſion the remiſſion of puniſhment, as ſhall be demonſtrated in it's proper place.

Puniſhment is inflicted equally upon *freemen* and *ſ*

THE ſlave and the freeman, with reſpect to amputation, are upon an equal footing, as, in the text which occurs upon this head, no diſtinction is made between them; and alſo, becauſe it is impoſſible to *halve* amputation. The limb of a ſlave, therefore, is to be ſtruck off in the ſame manner as that of a freeman, in order that men's property may be preſerved.

* The value of the *dirm* ſeems to be very indefinite. It is elſewhere [Vol. I. p. 24.] obſerved that the *dirm* is about 2*d.* ſterling, which preciſely accords with it's relative value, (as there mentioned) in reſpect to an *Awkiyat* of ſilver. But here we ſee the *deenâr* eſtimated at ten *dirms:* now a *deenâr*, according to the beſt authorities, is nearly of the ſame value with a ducat, namely about *ſeven ſhillings*; and hence it would appear that the value of the *dirm* is from *eight* pence to *nine* pence ſterling; and upon this calculation the value of a theft, to induce amputation, muſt be at leaſt *ſix and eight pence ſterling.* In fact, where the eſtimates are ſo various (owing, probably, to difference of times and countries) it is impoſſible to aſcertain any preciſe ſtandard.

Puniſhment is due upon a ſingle confeſſion;

Amputation is to be inflicted upon a ſingle confeſſion, according to *Haneefa* and *Mahommed.* *Aboo Yooſaf* ſays that the limb of a thief is not to be ſtruck off upon a ſingle confeſſion, nor until the confeſſion be twice repeated: and it is alſo recorded from *Aboo Yooſaf* that the confeſſion muſt be made twice at two ſeparate ſittings [of the *Kâzee*'s court,] becauſe *confeſſion* is proof as well as *evidence*, and is therefore ſubject to a ſimilar rule; and as, in evidence, two witneſſes are indiſpenſable, ſo in confeſſion, repetition is required; as in *whoredom*, (for inſtance) where, confeſſion being held ſubject to the rule of evidence, *four confeſſions* are required, in the ſame manner as *four witneſſes*. The argument of *Haneefa* and *Mohammed* is that theft is rendered apparent by a ſingle confeſſion, which therefore ſuffices, in the ſame manner as in caſes of retaliation, or puniſhment for ſlander; and there is no ground to judge concerning this from the rule in *evidence*, ſince by the abundance of witneſſes, in evidence, the ſuſpicion of falſity is leſſened with reſpect to the witneſſes; but a repetition of confeſſion is altogether uſeleſs, ſince no ſuſpicion exiſts with reſpect to the perſon confeſſing, which might be leſſened by a repetition of his confeſſion: neither is this repetition of any advantage in precluding a ſubſequent retractation, as the door of retractation or denial, in a caſe of *puniſhment*, is not ſhut by a repetition of confeſſion; and in a caſe of *property*, retractation or denial are not admitted after confeſſion, although it be only *once* made, becauſe the proprietor is ready to diſprove it: and the rule of repetition of confeſſion, in whoredom, is contrary to analogy, wherefore confeſſion in theft cannot be judged upon the ſame principle.

and alſo upon the teſtimony of *two wit-*

Amputation is to be inflicted upon the teſtimony of two witneſſes, becauſe by the teſtimony of two witneſſes the theft is made apparent, and fully eſtabliſhed, in the ſame manner as in all matters of right. But it is incumbent on the magiſtrate to examine the witneſſes concerning the *manner* of the theft, and alſo the *time* and *place*, for the greater caution, as was mentioned in treating of whoredom. The thief muſt alſo be held in confinement, on ſuſpicion, until the witneſſes be fully examined.

A number concerned in one:

If a *party* commit a theft, and each of the party receive *ten dirms*, the hand of each is to be cut off: but if they receive *leſs* than ten dirms each, they are not liable to amputation, becauſe the occaſion thereof is ſtealing to the amount which conſtitutes *larciny*, namely, ten *dirms*: amputation, moreover, is to be inflicted upon each on account of his offence, wherefore regard is had, with reſpect to each, to the completeneſs of the ſtandard amount of *theft*, which is ten *dirms*.

CHAP. II.

Of *Thefts* which occaſion *Amputation*, and of *Thefts* which do *not* occaſion it.

Amputation is not incurred by ſtealing things of trifling value,

Amputation is not incurred by the theft of any thing of a *trifling* nature, and the uſe of which is allowed among *Muſſulmans*, ſuch as *wood*, *bamboos*, *graſs*, *fiſh*, *fowls*, and *garden-ſtuff*;—becauſe *Ayeeſha* has ſaid that in the time of the prophet this puniſhment was not inflicted for ſuch petty thefts; and alſo, becauſe people are little intereſted in things which, although in their own nature *lawful*, yet are in no reſpect particularly deſirable: beſides, men not coveting theſe things, it is not probable that any one ſhould take them without the owner's conſent; it is therefore not requiſite to make examples, in order to deter people from ſuch thefts; (whence it is that amputation is not incurred by a theft of leſs than ten *dirms*.) *Cuſtody*, moreover, with reſpect to ſuch articles, is *defective*, inſomuch that pieces of timber (for inſtance) are thrown down without the door, and are not brought within the houſe, unleſs for the purpoſe of making repairs, and not with a view to *cuſtody*; and *fowls* run about at pleaſure, and *game* fly away; and in the ſame manner, things which are naturally lawful (ſuch as the articles before-mentioned) are held, in their original ſtate, to be *common property*, and this general participation occaſions a doubt, which operates to the prevention of puniſhment. Let it be alſo obſerved that ſalt *dried fiſh*, are here conſidered in the ſame predicament as *freſh*: and in the ſame manner, *tame* fowls, and *geeſe*, and *pigeons* are included among the *fowls* before-mentioned, as the precept of the prophet, to wit "*There is no amputation for* FOWLS," is general, and extends to all the feathered ſpecies. It is recorded from *Aboo Yooſaf* that amputation is incurred by the theft of any article whatever, except *water*, *flowers*, and *Soorkeen* *; (and ſuch alſo is the opinion of *Shafeï*,)—but the tradition of *Ayeeſha*, as before recited, is in proof againſt them.

or things which quickly decay,

AMPUTATION is not incurred by the theft of ſuch things as quickly *ſpoil* and *decay*, ſuch as *milk*, *fleſh-meat*, or *fruit*; becauſe of the ſaying of the prophet, "*The hand ſhall not be cut off for ſtealing* DATES, PALM-FRUITS †, *or* VICTUALS." By the word *victuals*, mentioned in this tradition, is meant ſuch things as ſoon ſpoil, ſuch as victuals cooked or ready for *eating*, and whatever elſe is of the ſame deſcription, ſuch as *fleſh* and fruits; but not *grain*; becauſe, if a perſon were to ſteal *wheat*, (for inſtance) or *ſugar*, all the doctors agree that his hand ſhould be ſtruck off. *Shafeï* mentions that the hand is to be ſtruck off for the theft of *all* the articles aforeſaid, becauſe of the ſaying of the prophet "*The hand ſhall not be*

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* *Cowdung* dried for *firing*.

† *Arab. Kooſa*. It is not, properly ſpeaking, a *fruit*, but a ſpecies of *kernel*, weighing ſix or eight ounces, and reſembling, in taſte, the kernel of the hazel nut. It grows at the top of the palm-tree, and is a ſort of crown to the pith, each tree bearing only one: it is commonly called the *cabbage* of the palm-tree.

" *ſtruck off for ſtealing* DATES *or* PALM-FRUITS,—*but where thoſe* " *are kept in a barn**, *amputation is incurred by the theft of them.*" Our doctors, on the other hand, contend that this ſaying implies no more than that the hand of a thief ſhall be ſtruck off for ſtealing *dried dates*, according to what is the general uſage, (for the general uſage is to keep *dried dates* in barns,) and for ſtealing *dried dates* the hand of a thief is ſtruck off according to our doctors alſo.

AMPUTATION is not incurred by ſtealing fruit whilſt upon the tree, or grain which has not been reaped,—theſe not being conſidered as *in cuſtody*.

or fruit upon the tree, or grain upon the ſtalk,

THE hand of a thief is not ſtruck off for ſtealing any fermented liquor, becauſe he may explain his intention in taking it, by ſaying, " I took it with a view to ſpill it;" and alſo, becauſe ſome fermented liquors are not lawful property, ſuch as *wine* for inſtance,—and concerning *others* there is a doubt, as to their being *property*.

THE hand is not to be cut off for ſtealing a guittar or tabor, theſe being of uſe merely as idle amuſements.

or muſical inſtruments,

AMPUTATION is not incurred by ſtealing a KORAN although it be ornamented†. This is the *Zâhir Rawâyet*. *Shafeï* ſays that by ſtealing a KORAN amputation is incurred, becauſe KORANS are capable of valuation, and therefore a ſaleable article. There are two opinions recorded from *Aboo Yooſaf* upon this point: according to *one* he coincides with *Shafeï*; but, according to *another*, he maintains that the hand is to be ſtruck off for ſtealing a KORAN, where the value of the ornaments amounts to *ten dirms*, becauſe thoſe ornaments are not a conſtituent part of the KORAN, and are therefore to be conſidered *ſeparately*. The reaſons for the deciſion in the *Zâhir Rawâyet* are *twofold*: FIRST, the perſon who takes the KORAN may plead that his intention was merely to *look into* and *read* it: SECONDLY, a KORAN is not property, with reſpect to what is *written* in it; and the *cuſtody* and care of it is only on account of what is *written* in it, and not for the ſake of the *binding*, the *ornaments*, or the *paper*, theſe being merely *appendages*, and, as ſuch, not to be regarded:—in the ſame manner as if a perſon were to ſteal a ſkin containing *wine*, the value of the ſkin amounting to *ten dirms*; in which caſe the hand of the thief would not be ſtruck off; and ſo in this inſtance likewiſe.

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* *Arab. Jooreen*, a ſort of *drying-room*.

† With *gold* or *ſilver claſps*, *jewels*, &c.

or the door of a *moſque*,

THERE is no amputation for ſtealing the door of a *moſque*, as this is not an object of *cuſtody*, and is therefore the ſame as the door of a houſe; nay, it is ſtill leſs the object of cuſtody than a *houſe*-door, ſince that ſerves for the preſervation of the effects within the houſe; whereas the door of a *moſque* does not anſwer this purpoſe; whence it is that amputation is not incurred by ſtealing ſuch effects as are kept within a moſque.

or a *crucifix* or *cheſs board*,

AMPUTATION is not incurred by ſtealing a *crucifix*, although it be of gold,—nor by ſtealing a *cheſs-board* or *cheſs pieces* of gold, as it is in the thief's power to excuſe himſelf, by ſaying "I took them with a "view to *break* and *deſtroy* them, as things prohibited." It is otherwiſe with reſpect to *coin* bearing the impreſſion of an *idol*, by the theft of which amputation is incurred; becauſe the *money* is not the object of worſhip, ſo as to allow of its deſtruction, and thus leave it in the thief's power to excuſe himſelf. It is recorded, as an opinion of *Aboo Yooſaf*, that if a *crucifix* be ſtolen out of a Chriſtian place of worſhip, amputation is not incurred; but if it be taken from a *houſe*, the hand of the thief is to be ſtruck off, for in ſuch a ſituation it is lawful property, and the object of *cuſtody*.

THE

or a free-born infant,

THE hand of a thief is not to be cut off for ſtealing a *free-born infant*, although there be *ornaments* upon it; becauſe a *free* perſon is not *property*, and the ornaments are only *appendages*; and alſo, becauſe the thief may plead that "he took it up when it was crying, with a "view to appeaſe it, or to deliver it to the *nurſe*." *Aboo Yooſaf* ſays that the hand of the thief is to be cut off where the value of the ornaments upon the child amounts to ten *dirms*; becauſe, as amputation would be incurred by the theft of the ornaments *alone*, it is ſo, where they are ſtolen along with any thing elſe.—The ſame difference of opinion obtains where a perſon ſteals a veſſel of *ſilver* (for inſtance) containing *pottage*, or any other culinary preparation. It is to be obſerved that this difference of opinion holds only where the child is incapable of *walking* or *ſpeaking*, for ſuch a child is not *in it's own* power or cuſtody.

or an *adult* ſlave.

AMPUTATION is not incurred by ſtealing an adult ſlave, as ſuch an act does not come under the deſcription of theft, being a *uſurpation*, or a *fraud*.

It is incurred

AMPUTATION is incurred by ſtealing an *infant* ſlave, as the conſtruction of theft is applicable to this offence: but if this infant ſlave be ſuch as can give an account of himſelf, in this caſe amputation is not incurred, becauſe an infant of this deſcription is the ſame as an adult, in this, that both are equally in their own cuſtody. *Aboo Yooſaf* ſays that amputation is not to be inflicted for ſtealing a ſlave, although he be an infant deſtitute of judgment, and unable to ſpeak. This proceeds upon a favourable conſtruction of the law, becauſe a ſlave is a *man* in one reſpect, and in this view is not a property, although he be ſo in *another* reſpect. The argument of *Haneefa* and *Mohammed* is that this infant ſlave is property, *generally* conſidered, as being capable of producing an *immediate* profit by the price which would ariſe from the ſale of him, and alſo of producing a *future* profit by the ſervice to be exacted from him after he becomes capable of ſervice; he is therefore *property* at the ſame time that he is alſo *a man.*

The hand of a thief is not cut off for ſtealing a *book*, whatever be the ſubject of which it treats, becauſe there the object of the theft can only be the *contents*, and that is not *property*. But yet it is to be obſerved that the hand is cut off for ſtealing *a book of accounts*, becauſe there the *contents* are not the object of the theft, but the *paper* and other materials of which the book is compoſed, and that is appreciable property.

The hand of a thief is not cut off for ſtealing a *cur-dog*, becauſe ſuch an animal is in it's nature common property [*], and not an object of attachment; and alſo, becauſe concerning it's being *property* there is a difference of opinion among the learned, and this occaſions a doubt upon that head.

The hand of a thief is not cut off for ſtealing a *drum*, *tabor*, *pipe*, or *pſaltery*;—according to the two diſciples, becauſe, in their opinion, theſe articles bear no price, whence, if any perſon were to deſtroy them he is not reſponſible;—and according to *Haneefa*, becauſe the perſon who takes them may excuſe himſelf by ſaying that he took them with a view to *break* them.

It is incurred by ſtealing a a *flute*,

The hand of a thief is cut off for ſtealing a *flute* made *ivory*, *ebony*, or *box*, ſuch as is termed, in the *Hindooſtânee* dialect, a *Sakoon*, or *Sawân*, as ſuch is an object of *cuſtody*, being held in eſtimation, and not of a *common* nature.

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[*] *Arab. Moobah-al-aſſil*, that is, *free to any one to take indifferently.*

[†] A ſpecies of hard wood, reſembling *lignum vitæ*.

THE

or a thing ſet with precious

THE hand of a thief is ſtruck off for ſtealing a *ring* ſet with an *emerald*, a *ruby*, or a *chryſolite*, as ſuch are *rare* articles, and not held to be of an *indifferent* nature among *Muſſulmans*; neither are they undeſirable; ſuch articles, therefore, are the ſame as *ſilver* or *gold*.

or

THE hand of a thief is ſtruck off for ſtealing utenſils made of *wood*, ſuch as a *platter* or a *door* (when not ſet in a *wall*) or a trunk, (although the hand would not be ſtruck off for ſtealing a piece of *timber*,)—becauſe theſe articles derive an intrinſic value from their *faſhion*, and are therefore objects of *cuſtody*: contrary to *matts* *, as in theſe the *workmanſhip* does not exceed the value of the material of which they are compoſed, for which reaſon *matts* are ſpread in places where they are not *in cuſtody*: the learned, however, agree that amputation is incurred by ſtealing *Baghdad* matts, as in *thoſe* the value of the *workmanſhip* exceeds that of the *article*. It is to be obſerved, that by ſtealing a *door*, or other article of timber not ſet in the *wall* of a houſe, amputation is incurred where ſuch door or other article is ſo light as to admit of *one man* carrying it away, as thieves do not covet articles of timber which are not portable.

It is not incurred by a

A BREACH of *truſt* †, by a truſtee ſecreting any property committed to his charge, does not induce amputation; as a *depoſit* is not in cuſtody of the *proprietor*. In the ſame manner, the hand of a *plunderer*, ‡ or of one who *ſnatches away* any thing, is not ſtruck off, as the act of ſuch is not *theft*, ſince thoſe carry away the property *openly*, and not *in a ſecret manner*; and the prophet has ſaid, "*The hand of a* "PLUNDERER, *or a* SNATCHER AWAY *of property, or a* BREAKER "OF A TRUST, *is not to be cut off.*"

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* Meaning any articles which are conſtructed of ſplit *reeds* or *bamboos*.

† *Arab. Khiânit*: (part. *Khâyin*.) It in this place evidently means *breach of truſt* by the context, but it bears a variety of other meanings, ſuch as to *deceive*, to *betray*, &c.

‡ It is difficult to diſtinguiſh between *rapine* and *robbery*; but this and the next following term, (like *Ghaſb*, or *uſurpation* of property,) have, perhaps, a reference to practices prevalent among the *Arabs*.

ſtealing the

THE hand of a *Nibâſh*, or plunderer of the dead, is not ſtruck off. This is the opinion of *Haneefa* and *Mohammed*. *Aboo Yooſaf* and *Shafeï* hold that amputation is incurred upon a *Nibâſh*, becauſe the prophet ſaid "*Whoever ſtealeth a winding-ſheet his hand ſhall I cut off*;"—and alſo, becauſe a winding-ſheet is an object of *cuſtody*, and appreciable property: the hand, therefore, is ſtruck off for ſtealing it. The arguments of *Haneefa* and *Mohammed* upon this point are twofold: FIRST, the prophet has ſaid "*The hand of a* MOOKHTAFEE *is not to be cut off*;" and, in the dialect of *Medina* a plunderer of the dead is termed a *Mookhtafee*: SECONDLY, concerning the *property* in a winding-ſheet there is a doubt; becauſe the *deceaſed* is certainly not the proprietor, as a corpſe is mere *dead matter*; and his *heir* is not the proprietor, as the neceſſity of the deceaſed precedes the inheritance of his heir; and there is alſo an uncertainty of the deſign of amputation (namely *warning*, or *determent*,) being obtained in this caſe, as this is a fact of rare occurrence. With reſpect to the declaration of the prophet, quoted by *Yooſaf* and *Shafeï*, it is to be conſidered merely as a *threat*. The ſame difference of opinion prevails in a caſe of ſtealing a winding-ſheet from a mauſoleum, having a door ſecured by a *lock*: or where a winding-ſheet is ſtolen out of a coffin whilſt upon a journey *.

or from the
[illegible] rea-

THERE is no amputation for ſtealing from the public treaſury, becauſe every thing there is the common property of all *Muſſulmans*, and in which the thief, as a member of the community, has a ſhare.

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* That is, whilſt carrying to the family place of interment, which may ſometimes be at the diſtance of ſeveral days journey, in which caſe the corpſe is put in a coffin; for otherwiſe the coffin is not uſed.

IF a perſon ſteal from property of which he is in part owner, in this caſe amputation is not to be inflicted.

or from property in which the thief has a ſhare;

IF a creditor ſteal from the property of his debtor, to the amount of his debt, amputation is not incurred, becauſe this is not *theft*, but only an exertion of his right: and a *deferred* debt [*] is the ſame as an *undeferred*, with reſpect to this rule. The ſame rule obtains where a perſon ſteals any thing which is originally his own property [†], becauſe a man has a right in whatever is his own. But if a creditor ſteal from his debtor any articles of his chattel property [that is, *goods* or *effects*,] in this caſe amputation is to be inflicted, becauſe a creditor is not at liberty to take his right out of the debtor's goods or effects, except by ſelling them, with the debtor's conſent, and reimburſing himſelf out of the price. It is recorded from *Aboo Yooſaf* that here likewiſe amputation is not incurred, becauſe many of the learned hold that a creditor is at liberty to ſeize the effects of his debtor for the purpoſe of obtaining his right, or by way of *pledge*. To this our doctors reply, that as this opinion is not ſupported by any authority, taking the goods as a ſatisfaction, or in the manner of a *pledge*, is not admitted without a plea: but, if the creditor ſhould make a plea, by ſaying "I took theſe "effects of my debtor only as a pledge in ſecurity of my right,"—or,—"as a ſatisfaction for my right,"—in this caſe puniſhment is remitted, becauſe he appears to have proceeded under a conception grounded upon the oppoſite opinion of *Aboo Yooſaf*, as above recited. The ſame difference of opinion alſo obtains if the right of the creditor conſiſt of *dirms*, and he ſteal *deenârs*, ſome holding that he incurs amputation, as the *deenârs* are not his right,—whilſt others maintain

or by a

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[*] *Arab. Dyne-Mowjil*, meaning a debt in the payment of which a delay is allowed for a certain ſpecified time, in oppoſition to a *Dyne Mooájil*, or *prompt* debt, that is, a debt, *payable upon demand.*

[†] As having been *borrowed* of him by another for inſtance.

that his hand is not to be ſtruck off, becauſe *money*, (namely *dirms* and *deenârs*) is all of one and the ſame nature.

Amputation cannot be inflicted *twice*, for ſtealing the ſame article from the ſame perſon,

If a perſon ſteal any particular article, and ſuffer amputation of his hand for the ſame, and after returning the property ſtolen to the proper owner, again ſteal that ſame article, without its having undergone any change in the interim, his foot is not to be ſtruck off for ſuch repeated theft. This proceeds upon a favorable conſtruction of the law. Analogy requires that his foot be cut off; (and there is an opinion of *Aboo Yooſaf* recorded to this effect; and ſuch alſo is the doctrine of *Shafeï*;) becauſe the prophet has ſaid "*If he again ſteal,* "*let amputation be again inflicted upon him*;" where no manner of diſtinction is made with reſpect to the article ſtolen in the *ſecond* theft being the ſame as that which was ſtolen in the *firſt*, or not, as the *ſecond* is a *complete theft* the ſame as the *firſt*, and even *more atrocious*, inaſmuch as the thief, having already ſuffered puniſhment, yet dares to repeat the very ſame offence. The offence is indeed the ſame as if the owner were to ſell the article ſtolen to the thief, and again to purchaſe it of him, and the thief then to ſteal it of him a ſecond time. But the reaſons for a more favourable conſtruction of the law herein are *two-fold*:—FIRST, in conſequence of the amputation of the thief's hand, the protection * of the thing ſtolen ceaſes,—that is, in conſequence of cutting off the thief's hand, the article ſtolen no longer remains protected in behalf of the right of the individual, (as ſhall be hereafter demonſtrated;)—and although, on returning it to the owner, it revert to a ſtate of protection, yet an apprehenſion of the protection having ceaſed ſtill remains, judging from unity of *right of property* and of *ſubject*, and from the exiſtence of the *cauſe* of the failure of protection,—that is, judging from the circumſtances of this property being that ſame individual property the protection of which had been already deſtroyed by the former theft and ſubſequent puniſhment,—

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* *Arab. Iſmut.* Our lexicons give *Tutâmen* as the *original* and *Caſtitas* as the *occaſional* meaning of it.

ment,—and of the *preſent* proprietor being the ſame who was *formerly* proprietor,—and of the *cauſe* of the failure of protection (namely, the amputation already inflicted) being ſtill exiſtent: contrary to the caſe adduced by *Shafeï*, becauſe in *that* caſe the right of property has been of a *different nature*, as being derived from a *different ſource**:—SECONDLY, the *repetition* of the theft of the ſame article by the ſame thief, after his hand being cut off, is a circumſtance of rare occurrence; wherefore the infliction of puniſhment a *ſecond* time can anſwer no end; for the end of puniſhment is to reſtrain from guilt; and that end is obtained without a *ſecond* infliction of puniſhment; the caſe in queſtion being analogous to one where a perſon who had been puniſhed for ſlander again accuſes the ſlandered perſon of the ſame fact of whoredom with which he had before charged him, in which inſtance a *ſecond* puniſhment is not incurred by ſlanderer; and ſo here likewiſe.—What is now advanced proceeds upon the ſuppoſition that the thing ſtolen does not undergo any *change* after being returned to the owner:—but if it be changed from it's former ſtate, (as if a perſon were to ſteal thread, and ſuffer amputation, and return the thread to the owner, and the thread be afterwards woven into *cloth*, and the thief ſhould then ſteal the cloth,) the thief's foot is cut off, becauſe the thing ſtolen has been altered by *weaving*; (whence it is that if a perſon ſeize a parcel of thread by *Ghaſb*, [uſurpation,] and weave the thread into cloth, he becomes proprietor of the cloth in conſequence of weaving it:—and this is an example of *change*, applicable to any ſubject whatever:) and where the thing ſtolen undergoes a *change*, the *doubt* ariſing from unity of ſubject, and amputation on account of the former theft of it, is removed; wherefore amputation is repeated, by cutting off the foot.

unleſs it have undergone a *change* in the interim between the thefts.

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* The *ſource* or *cauſe* of the *laſt* right of property being *purchaſe from the thief*, which is totally diſtinct and different from the cauſe of the *firſt* or *original* right of property, whatever that may have been.

CHAP. III.

Of *Hirz*, or *Cuſtody*; and of taking away Property thence.

There is no amputation for ſtealing

or

or from any

If a perſon ſteal any thing from the property of his *father*, *mother*, or *ſon*, his hand is not cut off; becauſe any of thoſe is at liberty, by a *mutual right of uſufruct* *, to take and uſe the property of the other; and alſo, becauſe the effects of either of them is held, in virtue of this mutual right, to be within the cuſtody of the other: and in the ſame manner, if a perſon ſteal from the property of his relation within the prohibited degrees, his hand is not cut off, for the *ſecond* of the above reaſons: contrary to the caſe of perſons who are merely *friends*, for if one of theſe were to ſteal from the other, his hand is cut off, ſince his act of *theft* puts an end to their friendſhip. What is now ſtated reſpecting the caſe of theft from a relation within the prohibited degrees is contrary to the doctrine of *Shafeï*, he accounting the affinity of all except parents and children to be a *diſtant* affinity, as was before mentioned, in treating of the emancipation of ſlaves.

or from a *ſtranger*, in a prohibited relation's

by ſtealing from a prohibited relation in a ſtranger's houſe;

If a perſon ſteal, out of the houſe of his relation within the prohibited degrees, the effects of a ſtranger, his hand is not cut off; but if he ſteal the effects of a prohibited relation out of the *ſtranger*'s houſe, his hand is ſtruck off; becauſe in the *former* caſe the theft is not a violation of cuſtody whereas in the *latter* it

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Arab. Imbiſât, literally meaning "*a mutual liberty.*"

or from a *nurſe.*

IF a perſon commit a theft upon the property of his foſter-mother, his hand is cut off. This is the *Zâhir Rawâyet.* It is recorded from *Aboo Yooſaf* that his hand is *not* to be cut off, becauſe men are at liberty, at all times, to enter their foſter-mother's apartments without form or permiſſion: contrary to the caſe of a foſter-*ſiſter*; for the reaſon which operates in the inſtance of a foſter-*mother* does not here exiſt. The ground upon which the *Zâhir Rawâyet* proceeds herein is that although *prohibition* ſubſiſt between a man and his foſter-mother, yet there is no *relationſhip* between them; and the prohibition which exiſts independent of affinity (ſuch as that occaſioned by *whoredom,* or *touching in luſt**,) has not the full effect of prohibition by affinity, whence, if a man were to ſteal any thing out of the houſe of the daughter of a woman with whom he had committed whoredom, his hand would be cut off, although between him and the daughter prohibition exiſt. By ſtealing, therefore, from the property of a foſter-mother, amputation is incurred. The foundation of this is that foſterage is not commonly a thing of *notoriety,* wherefore men have not a mutual right of uſufruct with their *foſter*-mothers, in order to avoid giving room for ſuſpicion: contrary to the right which ſubſiſts with reſpect to the *natural* mother.

It is not incurred by ſtealing from an *huſband,* or *wife*; or *maſter* or *miſtreſs*; or a

IF, of a huſband and wife, either party ſhould ſteal from the property of the other,—or a ſlave from the property of his maſter, or of his maſter's wife, or of his miſtreſs's huſband,—in none of theſe caſes is amputation incurred, becauſe in all of them the thief is, by cuſtom, at liberty to enter the houſe or apartment of the proprietor. If, moreover, in the ſame caſe of a huſband and wife, either were to ſteal any thing from a place of cuſtody belonging excluſively to the other, (as if, out of an apartment ſolely reſerved to the other's uſe, and in which they do not both reſide,) in this caſe alſo the hand of the thief is not cut off, according to our doctors, (who in this inſtance differ from the opinion of *Shafeï*,) as there is a mutual right of uſufruct between huſband and wife, both according to *cuſtom*, and alſo *by conſtruction*, for the contract of marriage demonſtrates this mutual right of uſufruct between them. This diſſent of *Shafeï*, in the preſent caſe, correſponds with his difference of opinion with reſpect to giving evidence; for the evidence of a huſband or wife regarding each other is not admitted by our doctors; but by *Shafeï* it is admitted.

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* See Book II. chap. 2.

nor by a maſter ſtealing from his *Mokâtib*.

If a maſter ſteal from the property of his *Mokâtib*, his hand is not ſtruck off, becauſe a maſter has a right in his *Mokâtib*'s acquiſitions. And in the ſame manner, the hand of a thief is not cut off who ſteals any thing out of *publick plunder*, becauſe in that he has a ſhare. This caſe, with its reaſoning, is taken from *Alee*.

Two different deſcriptions of cuſtody.

Custody is of two kinds: first, that which is *cuſtody* from its own nature, ſuch as a houſe or *Serai* *; secondly, *cuſtody*, by perſonal guard.—(The compiler of the *Hedâya* obſerves that cuſtody is an indiſpenſable requiſite to the eſtabliſhment of larciny, ſince without cuſtody the circumſtance of *ſecretly taking away* cannot be eſtabliſhed.) Thus *cuſtody* is ſometimes conſtituted by *place*, that is by a place conſtructed or appointed for the ſafe keeping of goods and effects, ſuch as a *houſe*, *ſhop*, *tent*, or *trunk*; and it is alſo ſometimes conſtituted by perſonal guard, that is, by perſonal watch over the property, ſuch as if a man were to ſit in the middle of the highway, or in a moſque, having his effects near him, in which caſe thoſe effects are in *keep* or *cuſtody*; and the prophet once cut off the hand of a perſon who had ſtolen a quilt from underneath the head of *Sifwan*, whilſt he lay aſleep in a moſque. It is to be obſerved that an article which is in cuſtody by *place* is not in cuſtody by *perſonal guard*: and this is approved, ſince that article is in cuſtody, *without* any perſonal *guard*, by the cuſtody of *place*, (ſuch as a houſe, and ſo forth,) although that place be without a *door*, or have a door ſtanding open, (whence if a perſon ſteal any of the furniture from that place, his hand is cut off,) becauſe a houſe or ſuch other edifice is erected for the purpoſe of ſecurity. The hand, however, is not to be cut off unleſs the article ſtolen be carried out of the houſe, for until that happens it is conſidered as in the hands of the maſter of the houſe: contrary to things in cuſtody by perſonal guard, for here the thief's hand is ſtruck off for the mere *taking*, as on the inſtant of *taking* the property of the proprietor is deſtroyed; wherefore the larciny is completed by the *taking* alone. It is to be further obſerved that no diſtinction is here made between the keeper being *aſleep* or *awake*, or the effects being *under* him, or *near* him: and this is approved; becauſe a perſon ſleeping *near* his effects is accounted to be *watching* them, in common acceptation; upon which principle it is that a truſtee or borrower is not reſponſible, where the truſtee ſleeps near the depoſit, or the borrower near the article borrowed, in caſe of any accident befalling it, becauſe their ſleeping is not held a deſertion of the charge of that property: contrary to what is adopted in the *Fatávee* *, for in ſome decrees it is ſaid that if the truſtee or the borrower lie down with the depoſit or the loan under his head, and it be ſtolen, he is reſponſible.

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* A quadrangular building, having ſheds or houſes all opening into the ſquare within. A high wall ſurrounding the whole forms the back of the houſes or ſhops; and the only entrance is by one or (at moſt) two gateways.

Various caſes

IF a perſon ſteal things out of a place which conſtitutes cuſtody, ſuch as a *houſe*,—or from a place which does *not* conſtitute cuſtody, whilſt the proprietor is near and has them within his guard,—his hand is ſtruck off, becauſe he has ſtolen property from *one* of the *two* ſpecies of *cuſtody*.

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* A collection of decrees or deciſions of the *Muſſulman Muftis* or *Kâzees*. There are many law books which bear this title.

If a perſon ſteal property out of a *bath*, or from a, houſe which the owner allows all men indifferently to enter, his hand is not to be cut off, becauſe general acceſs is allowed to a bath by *cuſtom*, and to a houſe by a particular permiſſion, whence there is a doubt with reſpect to ſuch a place conſtituting *cuſtody*. This is where the things are ſtolen out of the bath or houſe during the exiſtence of ſuch general leave of ingreſs: and the ſame rule applies to ſhops or *Caravan-Serais*, becauſe the maſter allows men to enter a ſhop or *Caravan-Serai*:—but yet, if a perſon were to ſteal any thing therefrom during the night, his hand is to be cut off, as thoſe places are conſtructed for the protection of property, and people are allowed to enter them in the *day-time* only.

If a perſon ſteal goods out of a moſque, and the proprietor be near thoſe goods, the hand of the thief is ſtruck off, as they are under cuſtody by *perſonal guard:* but if a perſon ſteal goods out of a bath or houſe the owner of which allows people to enter it, and the proprietor of the goods be near them, the thief's hand is not cut off. The difference between a *moſque*, and the bath or houſe now mentioned, is that a moſque is not erected with a view to the ſecurity of property, wherefore cuſtody is in that caſe regarded as conſtituted by *perſonal guard*, and not by means of the *place:* contrary to the *houſe* or *bath*, as theſe are conſtructed for the purpoſe of ſecurity, wherefore cuſtody there is not regarded as depending upon perſonal guard: and concerning ſuch a place conſtituting cuſtody there is a doubt, on account of the general permiſſion of ingreſs; for which reaſon the thief's hand is not ſtruck off.

Amputation is not incurred by a *gueſt* ſtealing from his *hoſt*;

If a gueſt ſteal the property of his hoſt, his hand is not cut off, as the houſe of the hoſt is not a place of cuſtody with reſpect to the gueſt, becauſe the gueſt is allowed to enter it,—and alſo, becauſe a gueſt is as an *inhabitant* of the houſe of his hoſt; the act of the gueſt, therefore, is *treachery*, or *breach of truſt* only, and not *theft*.

nor by
ing in a *Serai*,
unleſs the
the outer
gate; or
unleſs the *Se-*

If a perſon ſteal any thing in a *Serai*, and do not carry it entirely out of ſuch *Serai*[*], his hand is not cut off; becauſe the whole *Serai* is one place of cuſtody, wherefore it is requiſite to the eſtabliſhment of the theſt that the thing ſtolen be carried quite out of the *Serai*;—and alſo, becauſe the *Serai* and whatever it contains is in the hands of the maſter of it, by conſtruction, wherefore there is a doubt whether the thief has yet conveyed it away. If, however, the *Serai* be one of thoſe which contain a number of independent habitations, the occupiers of which have no common uſe of the area or ſquare, excepting merely as a *paſſage* or *thoroughfare*, and a perſon were to ſteal any thing out of one of theſe habitations, and carry it forth into the area, his hand is to be cut off, becauſe every one of theſe habitations is (with reſpect to the *inhabitants*) a ſeparate place of cuſtody; for which reaſon, if one of theſe were to ſteal any thing out of the lodge or habitation of another, he incurs amputation.

Caſes of
glary.

If a thief break through the wall of a houſe, and enter therein, and take the property, and deliver it to an accomplice ſtanding at the entrance of the breach, amputation is not incurred by either of the parties, becauſe the thief who entered the houſe did not carry out the property; and that property, before his *coming out*, fell into the poſſeſſion of another, which poſſeſſion is regarded; and the other thief has not committed any violation of cuſtody, as he did not enter into the place of cuſtody; and hence the full ſenſe of *larciny* is not applicable to the act of either of them. It is recorded from *Aboo Yooſaf* that if the thief who goes *within* the houſe put his hand *through* the breach, and the thief without thus take the property from him, the hand of the former is cut off: but if he who remains *without* put his hand through the breach into the houſe, and thus take the property from him who is *within*, each of them incurs amputation. This example is founded upon another which will be hereafter recited.—If the thief within throw the property out, through the hole, into the highway, and then come forth, and take it away, his hand is to be cut off. *Ziffer* ſays that his hand is not cut off, becauſe the act of throwing the property out upon the highway affords no pretence for amputation, any more than if he were to go away *without* carrying off the property, or than if another perſon were accidentally to come and carry away the property from the place into which it has been thrown, which would not occaſion amputation. Our doctors aſſert that the *throwing out* of the property is a contrivance commonly practiſed by thieves, as it may be impoſſible for a thief to get out with the goods or effects in his hand,—or, in order that the thief may be unincumbered, and at liberty, either to oppoſe the inhabitants of the houſe, or to eſcape; and as, in the caſe in queſtion, the property does not fall into the poſſeſſion of any other perſon, the *throwing out* and *carrying away* are both conſidered as *one act*. But where the thief comes out of the houſe, and goes away without carrying off the property, he ſtands as the *deſtroyer* of that property, and *not* as a thief. And if the thief load the property upon an aſs or other animal, and leading the animal, thus take the property out of the houſe, in this caſe his hand is cut off, becauſe the motion of the animal is referred to the thief, on account of his *leading* or *driving* him.

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[*] That is, out of the outer gate of the quadrangle.

If a party, or band of robbers, come within the place of cuſtody of any perſon, and ſome of them take away the property whilſt the others ſtand by, they all incur amputation. The compiler of the *Hedâya* remarks that this proceeds upon a liberal conſtruction of the law; for analogy would ſuggeſt that thoſe only incur amputation who take and carry out the property, (and ſuch is the opinion of *Ziffer*,) becauſe, as they take the property out, the definition of larciny applies only to them.—Our doctors, however, aſſert that they are all, by conſtruction, equally concerned in carrying out the property, as being all *aiding* therein, in the ſame manner as in the greater ſpecies of larciny, (namely, *highway robbery*,) where ſome take the property, whilſt others ſtand by prepared for an attack; becauſe it is cuſtomary for ſome to carry off the property, whilſt others ſtand ready, with arms in their hands, to reſiſt the proprietor; if, therefore, theſe were not liable to amputation, the door of puniſhment would be cloſed.

IF a perſon make a breach in the wall of a houſe, and extend his hand through, and in this manner take any thing out, ſtill his hand is not ſtruck off. This is the *Záhir Rawáyet*. *Aboo Yooſaf* has ſaid that his hand is to be ſtruck off, becauſe he has taken the property out of a place of cuſtody, and as this is the deſign of theft, his entrance into the place of cuſtody is not requiſite; in the ſame manner, as where a thief puts his hand into the cheſt of a banker, and takes out money, *without* himſelf entering the cheſt; in which caſe he forfeits his hand; and ſo here likewiſe. The reaſon for the deciſion in the *Záhir Rawáyet* is that the eſtabliſhment of larciny reſts upon a *complete violation of cuſtody*, in order that no doubt may remain reſpecting it; and the violation of cuſtody is *completely* eſtabliſhed only where the thief enters the place of cuſtody, and where the place admits of this being ſuppoſed: as, therefore, it is cuſtomary for thieves to enter into the place of cuſtody, regard muſt be had to that circumſtance. It is otherwiſe in the caſe of a *cheſt*, as there the *hand* only can be introduced, and not the whole *perſon*: it is otherwiſe, alſo, in the caſe before obſerved, of ſome thieves carrying away the property whilſt others ſtand by, prepared to oppoſe the proprietor, as this is the cuſtom of thieves.

Caſes of theft committed *upon the perſon.*

IF a perſon keep his money in his ſleeve, and tie a knot upon it, in ſuch a manner that the knot is on the *outſide*, and a cutpurſe come, and tear off the part of the ſleeve which contains the money, and take it away, he does not incur amputation. If, however, a perſon keep his money in his ſleeve, and tie a knot upon it, in ſuch a manner that the knot is *inſide* the ſleeve, and a cutpurſe carry it off by putting his hand *under* the ſleeve and tearing off the part which contains the money, ſo taking it away, in this caſe his hand is to be ſtruck as he here introduces his hand *within* the place of cuſtody, (namely the ſleeve) whereas, in the former inſtance, he took the money from *without*. If, on the other hand, he do not tear away the part which contains the money, but open or untie the knot, and ſo take away the money, the rule is reverſed; that is, in the *firſt* of theſe caſes his hand is cut off, but not in the *ſecond*. The reaſon of this is that, in the *former* inſtance, where the knot is on the *outſide*, by opening it the money falls *within* the ſleeve, whence he is under a neceſſity of putting his hand within the ſleeve, in order to take it away; amputation is therefore incurred, becauſe here he takes the money out of a place of cuſtody, and thus commits a violation of cuſtody: but in the *latter* inſtance, where the knot is *inſide* the ſleeve, by opening it the money appears *outſide* the ſleeve; and as he thus takes it from the *outſide*, and not from *within*, his taking it is not a violation of cuſtody; his hand, therefore, is not cut off, as he has not committed a violation of cuſtody. It is to be obſerved that, by the word *Sirrit*, in this work, is to be underſtood merely the place where the money is depoſited in the ſleeve, not a ſeparate *bag* or *purſe*. It is recorded from *Aboo Yooſaf* that in all theſe caſes amputation is incurred, becauſe the property is *in cuſtody*,—*with the proprietor*, in the one caſe, and *in his ſleeve*, in the other. Our doctors, on the other hand, aſſert that the *cuſtody*, in the caſe in queſtion, is conſtituted by the perſon's *ſleeve*, as he truſted in it for ſecurity; and his deſign in putting the money there is convenience, in going from place to place, and eaſe whilſt at reſt; wherefore the *ſecurity* of it is not his deſign, his *ſleeve* not being conſidered as a *bag*.

Amputation is not incurred by ſtealing one out of a ſtring of camels; or a camel's load,

If a perſon ſteal *one* out of a *ſtring* of camels, or ſteal a *load* from *one* of them, his hand is not cut off, becauſe with reſpect to the camel or the load being in *cuſtody* there is a doubt. The reaſon of this is that the deſign of the drivers and riders is convenience upon the journey, and the tranſportation of their goods, and not the *ſecurity* or *protection* of them. If, however, there be a perſon attending the loads for the purpoſe of looking after them, the learned ſay that in this caſe the hand of the thief muſt be cut off. If, alſo, the thief break open the package, and take its contents, his hand is ſtruck off, becauſe in ſuch a caſe the *package* conſtitutes the *cuſtody*, as the deſign in putting the goods there is the ſecurity of them, in the ſame manner as a ſleeve; in this caſe, therefore, the definition of theft, namely, *taking property from cuſtody*, is applicable; and ſuch being the caſe, his hand is cut off of courſe.

broke open.

Caſe of theft from cuſtody of the perſon.

IF a perſon ſteal a bag or package, containing goods, from a place which does not conſtitute *cuſtody*, (ſuch as the *highway*,) whilſt the proprietor of the effects is watching or ſleeping near them, his hand is ſtruck off, becauſe thoſe goods are in cuſtody by means of the guard of their owner, as regard is had to the cuſtomary mode of watching things, and the owner of the bag ſitting near or ſleeping upon it is accounted to be in guard of it by cuſtom:—his ſleeping *near* it is alſo, from cuſtom, accounted as *guarding* it;—this is approved doctrine.

CHAP. IV.

Of the Manner of cutting off the Limb of a *Thief*, and of the Execution thereof.

For the firſt offence the *right hand* is to be ſtruck off;

THE right hand of a thief is to be cut off at the joint of the wriſt, and the ſtump afterwards cauteriſed. The amputation is on the authority of the text of the *Koran* formerly quoted; and it is to be the *right* hand, on the authority of the reading of *Ibn Maſâood*, who reads the paſſage alluded to—"CUT OFF THEIR RIGHT HANDS.

the he *left foot*; and for any beyond that the thief is to be *impriſoned*.

were not applied, the amputation might prove deſtructive; and puniſhment is inflicted with a view to *warning* and *determent*, but not for *deſtruction*.—If the thief who has thus been deprived of his hand again commit a theft, his left foot is to be cut off. If, however, he again be guilty of theft, a *third* time, he is not to ſuffer any further mutilation, but muſt be impriſoned, and held in confinement, until he repent. Concerning the *time* ſufficient to effect and confirm ſuch repentance there are various opinions; ſome ſaying that this is to be left to the judgment of the *Imám* or *Kázee*;—others, that the impriſonment ſhould be *for one year*;—and others, that it ought to be *until death*;—whilſt others, on the other hand, maintain that he is to be held in durance until ſuch time as repentance be aſcertained from his converſation and behaviour. What is here advanced,—"if he be again guilty of theft, a third time, he is not to ſuffer any further mutilation, but muſt be impriſoned," *&c.* proceeds upon a favourable conſtruction of the law:—and our modern doctors ſay that *Tázeer*, or diſcretionary correction, may alſo be inflicted. *Shafeï* ſays that for the *third* offence the left hand is to be cut off, and, for the *fourth*, the right foot, becauſe the words of the prophet are "*If a man commit a theft cut off one of his limbs; and if he again commit the ſame, cut off another limb; and if he again commit the ſame, a third time, cut off another limb; and if a fourth time, another; and if he commit theft a fifth time, put him to death.*"—There is alſo an ordinance of the prophet, ſtill more particularly according with the tenets of *Shafeï* upon this head, which is mentioned by *Aboo Hareera*, who reports the prophet to have ſaid, "*Whoever commits a theft, his right* "*hand is to be cut off; and if he again commit theft, his left foot; and* "*if again, his left hand; and if again, his right foot: becauſe the third* "*theft is an offence in the ſame degree as the firſt, and is even more atro*"*cious; wherefore for the third offence the law awards puniſhment in* "*a ſuperior degree.*" The arguments of our doctors upon this point are threefold: FIRST, *Alee* has declared, reſpecting a perſon who had been a third time guilty of theft, "*Whilſt I live by the favour of God,* "*ſhall I not leave him a hand with which to feed himſelf, or a foot with* "*which to walk?*"—the propriety of which declaration being diſputed by ſome of the companions, *Alee* argued the point with them, and overcame their ſcruples; wherefore they all ſubſcribed to his opinion, and conſequently the whole of them are agreed concerning it: SECONDLY, the amputation of the left hand in the *third* inſtance, and of the right foot in the *fourth*, is in fact a deſtruction of the thief, ſince by cutting off the left hand he is totally deprived of *one* faculty, and puniſhment is inſtituted with a view to *determent* and not to *deſtruction*: THIRDLY, the repetition of theft a third time is a thing of *rare* occurrence, and determents are inſtituted concerning things which are of *frequent* occurrence. It is otherwiſe in retaliation, with reſpect to the members of the body; for as that is a right of the individual *, ſo the individual is to exact it, as far as may be practicable, on his own behalf. As to the tradition adduced by *Shafeï*, it is either unworthy of being ſeriouſly regarded, (as having been ridiculed by *Tahávee*,) or elſe it is to be conſidered merely as a *threat*.

The *left hand* or *right foot* is not to be amputated in defect of the *right hand* or

IF the left hand or right foot of a thief be paralytic, or have been loſt by accident, his right hand or left foot muſt not be cut off, ſince by the loſs of theſe he is deprived of one of his faculties of *walking* or *carrying*. In the ſame manner, the right hand of a thief muſt not be cut off where the thumb or any two fingers of the left hand are loſt or uſeleſs; becauſe in ſuch a ſtate the hand is held to be incapable of performing its offices: but if only *one* finger of the left hand be uſeleſs or loſt, the right hand may be cut off, becauſe there is no apprehenſion of the hand being diſabled from carrying, by the deprivation of *one* finger only.—It is otherwiſe where there are *two fingers* wanting; as *two fingers* are held to be equivalent to a *thumb*, in reſpect to the capacity of *carrying*; hence from the want of them it is to be apprehended that the hand is uſeleſs.

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* In oppoſition to puniſhment, which is a right of GOD, (*i. e.* of *the* LAW.)

An executioner ſtriking off the *left* hand inſtead of the *right* is not reſponſible;

If the magiſtrate order the executioner to *cut off the right hand of a certain thief*, and the executioner wilfully cut off his *left* hand, nothing is incurred [by the executioner,] according to *Haneefa*. The two diſciples allege that where the act of the executioner is *intentional*, he is reſponſible for the hand, but where it is *by miſtake*, he incurs no retribution. *Ziffer* ſays that in a caſe of *miſtake* he is alſo reſponſible; and this is agreeable to analogy. By *miſtake* is here meant an *error in judgment*; in other words, that the executioner ſuppoſes or conceives it is equally lawful to cut off the *left* hand, conſidering the text of the *Koran*, according to which it would appear that *either* may be ſtruck off indifferently, the *right* not being particularly ſpecified. Where, however, the executioner miſtakes with reſpect to the *hand* of the thief, ſaying afterwards "I ſuppoſed this to be the *right* hand," this is no excuſe, ſince ignorance is not admitted as an excuſe in things which are evident. (Some doctors allege that this alſo is admitted as an excuſe.) The argument of *Ziffer* is that the executioner has cut off an hand the amputation of which was not awarded; and as a miſtake which affects an individual is not an object of remiſſion, he is conſequently reſponſible: but to this we reply that the executioner has only been guilty of an error in judgment ariſing from the text in queſtion not having particularly ſpecified the *right* hand; and an error in judgment may be forgiven. The argument of the two diſciples is that where the executioner acts *intentionally*, he unrighteouſly and without explanation cuts off a limb the amputation of which is not awarded; and as, in ſo doing, he commits a wilful and deſigned injury, he cannot be forgiven, although his act proceed from an error in judgment:—it would appear, alſo, that *retaliation* is due; yet that is not due, but is even *prohibited*, on account of the doubt reſpecting his judgment. The argument of *Haneeſa* is that, although the executioner has deſtroyed one limb, yet he has left another limb of the ſame kind and of greater value, whence this privation cannot be accounted *deſtruction*; in the ſame manner as if evidence were given that a perſon had ſold certain effects for an adequate price, and the witneſs were afterwards to retract from his evidence, in which caſe nothing lies againſt the witneſs, ſince, although he have deſtroyed the other's property, yet the proprietor has received an equivalent in return, in conſequence of the evidence. Agreeably to this argument of *Haneeſa*, it in the ſame manner follows that, if any *other* than the executioner were thus to cut off the thief's left hand, this other is alſo free from reſponſibility: and this is approved.—If the thief reach forth his left hand, and ſay "This is my right hand,"—and the executioner ſtrike it off, he is not reſponſible, according to all our doctors, ſince he here acts by the thief's directions.—It is to be obſerved that where the executioner *wilfully* cuts off the *left* hand of the thief, the latter is reſponſible for the value of the property ſtolen, according to all our doctors:—according to the two diſciples, evidently, for as they hold that, in a *wilful* caſe, the executioner is reſponſible, the amputation is not, in fact, a *puniſhment for theft*; and puniſhment not being inflicted upon the thief, he is reſponſible for the property ſtolen, ſince agreeably to their tenets amputation and reſponſibility for the property ſtolen cannot be united:—and according to *Haneeſa*, becauſe in his opinion alſo the amputation of the wrong hand is not the *puniſhment allotted for theft*; for the reaſon why he holds that no reſponſibility attaches to the executioner is *not* becauſe the amputation of that hand is a *puniſhment for theft*, but becauſe he has, in lieu of that hand, left another more valuable, as has been already ſtated: and in a caſe of *error* alſo, the effect is the ſame, whence in this caſe likewiſe *Haneeſa* conſiders

nor is any *other* than the executioner reſponſible under the ſame circumſtance:

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ty ſtolen.

Amputation cannot be awarded, nor executed, but in the preſence and at the ſuit of the injured party.

A DECREE of amputation cannot be paſſed upon a thief, unleſs the perſon from whom the property was ſtolen be preſent, and proſecute for the theft, becauſe proſecution is eſſential to the manifeſtation of theft; and with reſpect to this rule, it matters not whether the theft be eſtabliſhed by *confeſſion* or by *evidence*, becauſe an offence committed againſt the property of another can in no way be rendered manifeſt but by the proſecution of the aggrieved *. This is according to our doctors. *Shafeï* maintains that in caſe of *confeſſion*, the preſence or proſecution of the perſon robbed are not requiſite: it is related, however, in the *Fattahal-Kadoor*, that this was not a tenet of *Shafeï*; but that he held *confeſſion* to be in all reſpects equal to *evidence*.—It is here to be obſerved that, according to our doctors, a ſentence of amputation cannot be carried into execution unleſs the perſon robbed be preſent, becauſe in puniſhment *execution* is ſupplemental to the *Kázee*'s decree.

Caſes of theft of a *truſt*, *depoſit*, or ſo forth.

IF a perſon ſteal a depoſit from the truſtee, or uſurped property from the uſurper, or property uſuriouſly acquired from the uſurer, (as if a perſon were to take *twenty dirms* in lieu of *ten dirms*, and make ſeizin of the ſame, and another were to ſteal from him *twenty dirms*, including the *ten* ſo acquired,) theſe are at liberty to proſecute the thief and to procure the amputation of his hand. In the ſame manner *alſo, (in the caſes of truſt, or of uſurpation,) the proprietor of the depoſit, or of the property uſurped, is at liberty to proſecute the thief, and to procure the amputation of his hand. Ziffer and Shafeï ſay that* the thief's hand is not be ſtruck off at the ſuit of the uſurper or the truſtee. The ſame difference of opinion obtains where a perſon ſteals property from an *hirer*, or *borrower*, or *Mozárib*, or a holder of *Bazât* ſtock, or a perſon having poſſeſſion of property with a view to purchaſe, or the holder of a pawn,—or from any perſon in whoſe hands property lies, and in whom the charge of it is veſted, although he be not the actual proprietor, (ſuch as the truſtee of a charitable appropriation, or a *father*, or *executor*,)—in all which caſes the hand of the thief is alſo ſtruck off at the ſuit of the *proprietor* of the property ſo ſtolen.—In the caſe of a *pawn*, however, the thief's hand is not to be ſtruck off at the ſuit of the pawner, unleſs the property ſtolen remain with the thief after payment of the pawnholder's debt, becauſe the pawner has no right to the property or claim upon it until the debt be paid. It is a rule with *Shafeï* that the *truſtee*, *uſurper*, *borrower*, &c. cannot ſue for the recovery of the property; and accordingly, that the thief cannot ſuffer amputation at their ſuit. *Ziffer* ſays that as their authority to proſecute, for the recovery of the property, is eſtabliſhed, from the neceſſity of protecting it, they cannot poſſeſs the ſame authority with reſpect to *amputation*, for if the thief's hand were cut off at their ſuit, the *protection* of the property would be defeated, ſince if the property were deſtroyed whilſt in the thief's poſſeſſion, he would not be reſponſible for it after having loſt his hand, and therefore, if his hand were cut off at their ſuit, the property no longer remains protected, but is loſt to the proprietor. Our doctors ſay that theft is, *in its own nature*, the occaſion of amputation: and amputation, in the caſes in queſtion, is eſtabliſhed by a decree of the *Kâzee*, iſſued in conſequence of a proſecution which is admitted *generally*, and not from *neceſſity*; becauſe, as the proſecution of thoſe perſons, for the purpoſe of manifeſting the theft, is on account of their wiſh to recover the property, their proſecution muſt be admitted *generally*, in the ſame manner as that of the *proprietor*: (for, the admiſſion of the proſecution of the *proprietor* for the purpoſe of manifeſting the theft is becauſe he is deſirous of recovering the property from the thief, ſo as that he may be enabled to diſpoſe of it according to his own pleaſure;—and the ſame motive is applicable to the proſecution of the *truſtee*, *uſurper*, *borrower*, or ſo forth, ſince they are alſo deſirous of recovering the property from him, that they may be enabled to diſpoſe of it according to their pleaſure; as the borrower or hirer are deſirous to recover it, in order to *make uſe* of it, and the pawner or truſtee in order to return it to the owner, and thereby free themſelves from the reſponſibility for it, and from their obligation to the charge of it:) ſince, therefore, it is evident that their proſecution muſt be admitted *generally*, in the ſame manner as that of the proprietor himſelf, what *Ziffer* alleges falls to the ground. With reſpect to what he further advances, that "if the thief's hand were cut off at their ſuit the "*protection* of the property would be defeated,"—we reply that the failure of protection is in this caſe neceſſarily involved, ſince as it appears that their proſecution is the ſame as that of the actual proprietor, it follows that at their ſuit the hand of the thief muſt be cut off; now one conſequence of amputation is that the protection of the property ceaſes; and the failure of this protection, as being a thing neceſſarily involved, is not to be regarded.

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* From this it appears that the confeſſion of a thief is not attended with any conſequence, unleſs the perſon robbed come forward to proſecute.

Objection.—Although their proſecution be admitted, yet it would appear that the hand of the thief ſhould not be cut off at their ſuit, ſo long as the proprietor is not preſent, becauſe it is poſſible that, if he were preſent, he might declare the thing ſtolen to be the property of the thief.

Reply.—This ſuppoſition is merely imaginary, and therefore of no weight; in the ſame manner as a ſimilar imaginary ſuppoſition would not be regarded in a caſe where the *proprietor* was preſent, and the *borrower* (or other perſon from whom the property had been ſtolen) abſent; for then the thief's hand would be cut off at the ſuit of the proprietor) according to the *Zâhir Rawâyet*,) although it be poſſible that, if the borrower or other perſon were preſent, he might declare that he had given permiſſion to the thief to enter the place of cuſtody where the goods were kept, as this is merely an *imaginary* ſuppoſition.

Caſe of a *ſe-cond* thief ſtealing the

IF the hand of a thief be cut off for ſtealing any property, and another thief ſteal the property from this thief, neither the firſt thief nor the proprietor are competent to proſecute the ſecond thief; becauſe the property is not *appreciable* in reſpect to the firſt thief, (whence if it were deſtroyed in his hands he is not reſponſible,) and it is not *protected* in reſpect to the proprietor, (whenc, if it had been deſtroyed in the hands of the firſt thief, he could not make him reſponſible;)—the ſecond theft, therefore, does not occaſion amputation. There is one tradition, according to which the firſt thief may take the property back from the ſecond thief, in order to reſtore it to the proprietor, which it is incumbent upon him to do: but, according to another tradition, the firſt thief is not at liberty to take back the property from the ſecond thief, as he had not been himſelf legally poſſeſſed of it, ſince a *legal poſſeſſion* or *ſeizin* means a ſeizin either of *proprietary*, *reſponſibility*, or *truſt*, and the ſeizin of the firſt thief is not of any of theſe deſcriptions. It is ſaid, in the *Fattahal-Takdeer*, that it is moſt eligible, in this caſe, if the proprietor be preſent, that the *Kázee* cauſe the property to be reſtored to him, or, if not, that he keep it with himſelf, as a truſt, neither reſtoring it to the *firſt* thief, nor yet leaving it with the *ſecond*, whoſe offence is manifeſt.—If, however, the *ſecond* thief ſteal the property *before* the infliction of amputation upon the *firſt* thief, or after the remiſſion of puniſhment in conſequence of ſome doubt [operating in bar of puniſhment,] his hand is cut off at the ſuit of the firſt thief; becauſe, in this caſe, the property is appreciable with reſpect to the firſt thief, ſince it would be unappreciable with reſpect to him only in conſequence of amputation; but here amputation has not taken place upon him; he is therefore, in this inſtance, the ſame as a *uſurper*.

Reſtoration of the property, before proſe- [illegible] ment:

If a thief return the property ſtolen to the owner, before the latter has commenced any proſecution againſt him, and the owner [illegible] ıg his complaint before the magiſtrate, in this caſe, (according to the *Zâbir Rawâyet*,) the hand of the thief is not ſtruck off. It is recorded from *Aboo Yooſaf* that his hand is to be ſtruck off, on account of the analogy between this and a caſe where the thief returns the property to the owner, after the accuſation. The reaſon adduced in the *Zâbir Rawâyet* is that proſecution is eſſential to the manifeſtation of theft; becauſe a theft cannot be made manifeſt but by evidence; and evidence is adduced only for the purpoſe of terminating the proſecution; and the *termination* of a proſecution without the *eſtabliſhment* of a proſecution is inconceivable; it is therefore evident that proſecution is eſſential to the manifeſtation of theft. Now, in the caſe in queſtion, the proſecution is terminated [in other words, is *precluded*,] by the reſtoration of the property to the owner, as this is the *end* of proſecution, which is obtained by this means; and as that which is eſſential to the manifeſtation of theft does not exiſt in this caſe, it follows that the theft is not manifeſted; and the theft not being made manifeſt, the thief's hand cannot be cut off, ſince without the manifeſtation of his theft, a thief cannot ſuffer amputation. It is otherwiſe where the thief reſtores the property after accuſation and the production of evidence, for in this caſe his hand is ſtruck off, becauſe the proſecution has arrived at its completion, and is therefore accounted ſtill to remain, though the thief have reſtored the goods at the time of inflicting amputation.

and ſo alſo, a gift of the property by the owner, to the thief, after ſentence has paſſed upon him;

If the *Kâzee* decree amputation, and the owner of the property ſtolen then take it, and make a gift of it to the thief, his hand is not ſtruck off; and ſo likewiſe, if he *ſell* them to the thief. *Ziffer* and *Shafeï* ſay that the thief is liable to amputation, (and the ſame is, in one place, recorded from *Aboo Yooſaf*,) becauſe in this caſe, the theft has been fully eſtabliſhed, and it does not appear, from the *gift* or *ſale*, that the thief was the proprietor at the time of his ſtealing the property; wherefore the *gift* or *ſale* is not the occaſion of doubt.—Our doctors ſay that *execution* is a ſupplement to the *Kázee*'s decree, in this inſtance; (becauſe, in the caſe in queſtion, it is not abſolutely neceſſary that the *Kázee* ſhould ſay "*I decree in this* "*manner*," ſince this is ſaid merely for the purpoſe of declaring or ſhewing forth a right, and announcing the ſame to the claimant of the right; but amputation is a right of GOD, and is therefore known to the claimant of right, namely GOD himſelf, without the *Kázee*'s declaration;) it is therefore requiſite that proſecution exiſt at the time of inflicting puniſhment; and as, in the caſe in queſtion, no proſecution appears at the time of puniſhment, it amounts to the ſame thing as if the owner of the property had conſtituted the thief a proprietor of it *prior* to the *Kázee*'s decree.

or a *depreciation* of the property to [illegible] ſt[illegible] theft.

IF the value of the property ſtolen be, by *depreciation*, diminiſhed to *within* the ſtandard of theft, (namely, *ten dirms*,) after ſentence and before execution, amputation does not take place. It is recorded from *Mohammed* that amputation is to be inflicted, and ſuch alſo is the opinion of *Ziffer* and *Shafeï*, they conceiving an analogy between this and a caſe where a deficiency occurs in the *actual thing* ſtolen, as if, for inſtance, a thief had ſtolen ten *dirms* from ſome perſon, and one of them ſhould afterwards be loſt or expended,—in which caſe the thief's hand would notwithſtanding be cut off,—and ſo here likewiſe.—Our doctors ſay that the completeneſs of the ſtandard of theft being a condition of amputation, it is alſo a condition that the completeneſs exiſt at the time of inflicting the puniſhment, according to what was before ſaid, that "*Execution* is a ſupplement "to the *Kazee*'s decree:" contrary to where a deficiency occurs in the *actual article* ſtolen, for in this caſe no diminution appears in reſpect to the *ſtandard of theft*; becauſe reſponſibility for that article lies againſt the thief as much as if the whole property ſtolen were deſtroyed, whereas no reſponſibility lies againſt the thief for a deficiency in the value, by *depreciation*: there is therefore an evident difference between the two caſes.

The thief's plea of *property* in the article ſtolen prevents puniſhment;

If, after witneſſes bearing evidence to a theft, the thief plead that the article alleged to have been ſtolen is his own property, his hand is not to be cut off although he produce no evidence in ſupport of his plea. *Shafeï* maintains that the puniſhment for theft is not remitted upon this plea, becauſe every thief has it in his power to plead that the property ſtolen is his own,—and hence, if puniſhment were to be remitted upon ſuch a plea, the door of puniſhment would be altogether cloſed. Our doctors ſay that *doubt* occaſions the remiſſion of puniſhment; and doubt is eſtabliſhed upon the plea, ſince it is poſſible that it may be true: and with reſpect to what *Shafeï* urges, that "no "thief can be at a loſs for ſuch a plea," it is not of any weight, becauſe retractation and denial are admitted after confeſſion, although a perſon confeſſing have it always in his power to retract and deny*.

and ſo likewiſe, a plea of property made by *one* of *two* thieves.

If two perſons confeſs to a theft, and one of them afterwards plead that the property is his, amputation is not inflicted upon either; becauſe the retractation is admitted and approved with reſpect to the perſon retracting, and this gives riſe to a doubt in regard to the other thief, as the theft is, in the preſent caſe, eſtabliſhed upon the evidence of both jointly, and hence the act of both is *one* act.

A perſon jointly concerned with another in a theft may be proſecuted and puniſhed although the other abſcond.

If two perſons commit a theft, and one of them afterwards abſcond, and two witneſſes bear evidence to the theft, as committed by *both*, againſt him who is *preſent*, his hand is cut off, according to the moſt recent opinion of *Haneefa*; and ſuch is alſo the opinion of the two diſciples. *Haneefa* was at firſt of opinion that the hand of the *preſent* thief ſhould not be cut off, ſince, if the *abſentee* were preſent, it is poſſible that he might advance ſome plea which might occaſion doubt. The reaſon on which the more recent opinion of *Haneefa* is founded is that abſence prevents the eſtabliſhment of theft with reſpect to the abſentee, as a decree of the *Kâzee* againſt an abſentee is illegal; therefore the theft of the abſentee is, as it were, *non-exiſtent*, and a thing which is non-exiſtent does not give riſe to *doubt*; and the mere *apprehenſion* of the occurrence of a doubt is not regarded, on the grounds before ſtated.

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* This reaſoning of the *Haneefite* doctors is ſo exceedingly *abſurd* and *unſatisfactory*, that it might perhaps be ſuſpected there is a miſtake either in the tranſlation or the text; but the former is *literal*; and all the copies of the latter, both *Perſian* and *Arabic*, perfectly coincide: certain it is that the argument of *Shafeï* remains altogether unanſwered.

Caſes of con-

IF a *Mahjoor* ſlave * make a confeſſion that "he had ſtolen thoſe "ten *dirms*,"—(there producing them,) his hand is cut off, and the property ſtolen is returned to the perſon who had been robbed of it. This is the doctrine of *Haneefa*. *Aboo Yooſaf* has aſſerted that his hand is to be cut off, but that the ten *dirms* belong to his maſter. *Mohammed*, on the other hand, ſays that his hand is *not* to be cut off, but that the ten *dirms* belong to his maſter. All this proceeds upon a ſuppoſition that the maſter denies his ſlave's allegation.—But if this ſlave confeſs that "he had ſtolen certain property, which no longer "exiſts, but is deſtroyed," his hand is to be cut off, according to all our doctors as here enumerated.—If, moreover, the ſlave be a *Mazoon*, his hand is to be cut off, whether the property ſtolen be remaining or expended. *Ziffer* maintains that the hand of a *Mazoon* is not to be cut off in any of theſe caſes; for it is a tenet of his that the confeſſion of a ſlave, inducing either puniſhment or retaliation, is not to be admitted; becauſe, as ſuch confeſſion affects either his *whole perſon*, or a *part*, and as his perſon, and every part of it, is the property of his maſter, his confeſſion is a confeſſion affecting another; and a confeſſion affecting another is not be received: but yet the *Mazoon* muſt be conſtrained to make ſatisfaction for the property ſtolen, where it has been deſtroyed; or, if it be remaining, he muſt be deſired to reſtore it; ſince his confeſſion is valid with reſpect to the *property*, as he has been inveſted, by his maſter, with power to make confeſſion in matters of property, whereas a *Mahjoor* ſlave's confeſſion reſpecting *property* alſo is not admitted. Our doctors allege that a *Mahjoor*'s confeſſion, inducing puniſhment, is admitted, as he is a *man* *, after which the confeſſion proceeds, dependantly, to affect the property, and thus this confeſſion is valid with reſpect to the property likewiſe: a ſlave moreover cannot be *ſuſpected*, in a caſe of confeſſion inducing puniſhment, ſince his confeſſion induces pain to himſelf, as his hand is cut off in conſequence of it; and a confeſſion of this nature is admitted although it tend to affect the right of another.—The argument of *Mohammed*, in the caſe of a *Mahjoor*, is that his confeſſion, as affecting *property*, is null; (whence his confeſſion with reſpect to an *uſurpation* of property, is not admitted;) any property, therefore, which is in the hands of the *Mahjoor*, is the property of his maſter; and the hand of a ſlave is not cut off for ſtealing the property of his maſter. A circumſtance which confirms this doctrine of *Mohammed* is, that the *property* is the *original* thing in a proſecution for theft, and the amputation only a *dependant*, whence a proſecution may be heard reſpecting the *property*, independent of amputation,—that is, if the proprietor ſue for the *property* and not for *puniſhment*, his ſuit is heard;—and ſo likewiſe, property is eſtabliſhed independent of amputation, where the evidence conſiſts of one man and two women,—or, where the thief makes confeſſion of the theft, and afterwards retracts and denies it:—but if the caſe were reverſed,—that is, if the owner of the property declare "I am deſirous that his hand "be cut off, and do not want the property," his ſuit is not heard; and in the ſame manner, amputation cannot be eſtabliſhed unleſs the property be eſtabliſhed: it is therefore evident that the *property*, in the caſe in queſtion, is the *original* thing, and amputation only a *de-*

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* Literally, a *prohibited* ſlave; that is, one who is incompetent to *buy*, *ſell*, or perform any other act whatever, *on his own behalf*; in oppoſition to a *Mazoon* or *privileged* ſlave, who (under certain reſtrictions,) is at liberty to act for himſelf.

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* And therefore ſubject to the penalties of the law, in common with other people.

pendant; and the confeſſion of a ſlave not being valid with reſpect to that which is the *original*, (namely the *property*,) it neceſſarily follows that it is not valid with reſpect to *amputation*, which is only a *dependant* thereof. It is otherwiſe in the caſe of a *Mazoon*, as his confeſſion with reſpect to the property in his hands is valid, and conſequently his confeſſion with reſpect to that which is its dependant (namely amputation) muſt be valid likewiſe. The argument of *Aboo Yooſaf* is that, in the caſe in queſtion, the *Mahjoor* has made a confeſſion affecting two points; FIRST, *amputation*, (which affects his own *perſon*, according to what was before obſerved, that "he is a *man*," and which is conſequently valid;) SECONDLY, *property*, (which affects his maſter, and is conſequently invalid with reſpect to the maſter:) now amputation may be incurred independent of *property*; as where a free perſon (for inſtance) confeſſes to his having ſtolen cloth, which is in the hands of *Zeyd*, by ſaying "I "ſtole this cloth from *Aumroo*," and *Zeyd* aſſerts the cloth to be his "own property, in which caſe the hand of the perſon ſo confeſſing is ſtruck off, although his confeſſion be not received in reſpect to that particular piece of cloth, whence it is not to be taken from *Zeyd*. *Haneefa* ſays that the confeſſion of a *Mahjoor* ſlave, where it induces puniſhment for theft, is valid, (according to what was before ſtated, that "he is a *man*;")—and his confeſſion muſt alſo be valid with reſpect to the *property*, in conſequence of its being ſo with reſpect to *puniſhment*; becauſe the confeſſion is made *after* the perpetration of the theft, and not at the *beginning* of it; and the property, *after* the theft, is a dependant of amputation; whence it is that the protection of that property ceaſes in conſequence of amputation; and alſo, that amputation is inflicted after the deſtruction of the property. It is otherwiſe in the caſe of confeſſion made by a *freeman*, as before cited; for there *amputation* only is due, but not the reſtoration of the *property*; becauſe the hand of a thief is to be cut off for ſtealing property from a *truſtee*; and it is here poſſible that the cloth is the actual property of *Zeyd*, and that the freeman had ſtolen it from *Aumroo*, in whoſe hands it was depoſited.—In a caſe where a ſlave ſteals the property of his maſter his hand is not cut off; whence there is an evident diſtinction between this caſe and that of a *freeman.*—This, however, applies ſolely to where the maſter of the ſlave *falſifies* his confeſſion:—for if the maſter *verify* his confeſſion, his hand is cut off in all theſe caſes, on account of the dereliction of that which would prevent it, namely, the *right of the maſter.*

The property ſtolen muſt be reſtored after amputation: but if it be loſt or expended, the thief is not reſponſible.

IF, after amputation being inflicted upon a thief, the actual property ſtolen yet remain in his poſſeſſion, it muſt be reſtored to the owner, as it ſtill remains within his proprietary: but if the property remain not with the thief, he is not reſponſible for it, whether it have been *conſumed* or *deſtroyed.* This is the opinion of *Aboo Yooſaf* and *Haneefa*, according to one report; and ſuch alſo is the doctrine of the *Rawâyet Maſhhoor.* *Haſan* records, from *Haneefa*, that ſatisfaction is due where the property has been *conſumed* or *expended.* *Shafeï* ſays that in every caſe ſatisfaction is due for the property, and that reſponſibility for the property does not ceaſe in conſequence of amputation, becauſe amputation and ſatisfaction for the property are both equally *rights*, although the *cauſe* of each be different; (for amputation is a right of the LAW, the occaſion of it being the perſons not refraining from the commiſſion of an act which the LAW forbids; and ſatisfaction for the property is a right of the *individual*, the occaſion of it being the *taking away* of the property;) both, therefore, are due; in the ſame manner as if a perſon were to deſtroy game, the property of another, and kept within an incloſure;—or to drink wine, the property of an infidel ſubject; in the *firſt* of which inſtances correction and ſatiſfaction for the property are both incurred; and, in the *ſecond*, puniſhment for wine-drinking, and ſatiſfaction. The arguments of our doctors upon this point are threefold: FIRST, the prophet has ſaid "*No reſponſibility lies againſt a thief after amputation:*"—SECONDLY, an obligation of reſponſibility prevents puniſhment; becauſe if the thief were *reſponſible* for the property ſtolen, he would, by making ſatisfaction

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for it, become the proprietor from the time that he had taken it, in the manner of a *ſucceſſion*[*], and it would then appear that he had taken *his own* property, whence his puniſhment would be prevented; but as amputation is held, by all the doctors, to be unavoidably incurred by him, he is not made reſponſible, ſince his being made ſo would prevent it: THIRDLY,—the protection of the property ceaſes at the time of the theft,—that is, it no longer remains in a ſtate of protection on behalf of the individual,—for if it remain protected merely *on behalf of the individual,* it follows that it is *in its own nature* neutral[†], and is prohibited[‡] only on account of the right of the individual: now this is a prohibition ariſing from circumſtances, and not exiſting in the thing itſelf; and as a thing which is in it's own nature *neutral* cannot occaſion puniſhment, it would follow that amputation is not to be inflicted upon the thief, on account of the doubt reſpecting *neutrality*; but as amputation *is* incurred, according to all the doctors, it neceſſarily follows that the property, at the time of the theft, becomes prohibited in behalf of the right of the LAW, in the ſame manner as *carrion*; and ſatisfaction is not due for *carrion.*—The failure (on the other hand) of the protection of the property, with reſpect to the *conſumption* of it, is not *apparent*, as the *conſumption* is another matter, diſtinct from the *theft*, and it is not neceſſary that the failure of protection be regarded with reſpect to the *conſumption* of the property alſo.—In the ſame manner, a doubt concerning neutrality is regarded in the thing which occaſions amputation, namely, the *theft*, but not in the thing which is dictinct from that,—namely, the *conſumption.* Upon this is founded what *Haſan* reports as the doctrine of *Haneefa*, that, "in "caſe of *conſumption* ſatisfaction for the property is due." The argument advanced in the *Rawâyet Maſhoor* is that the *conſumption* is merely the completion of the *deſign*, (for the deſign, in ſtealing the property, is, to *conſume* it;) regard, therefore, is paid to the *doubt of neutrality* before-mentioned, and hence ſatisfaction is not incumbent, ſince the thief has, as it were, deſtroyed a *neutral property.*—The protection of the property, moreover, is held to ceaſe with reſpect to reſponſibility, in a caſe of conſumption, as the failure of protection in a caſe of *conſumption* is a neceſſary conſequence of its failure in a caſe of *deſtruction*;—(in other words, the protection of the property ceaſes in the preſent caſe alſo, and hence the property is not *in protection* in ſuch a manner that reſponſibility ſhould be incumbent, any more than in a caſe of *deſtruction*;) for it is manifeſt that if the protection of property were to remain in a caſe of *conſumption* only, and ſatisfaction for that were made due, the agreement between the property in queſtion, (namely, *the property ſtolen*) and the property on account of which ſatisfaction is due, would be deſtroyed, ſince [if ſuch were the caſe] this property is protected on account of the right of the individual, both in the *conſumption* and alſo in the *deſtruction* of it, inſomuch that if any perſon were to uſurp it, he would be reſponſible for it, whether it be deſtroyed, or conſumed by the uſurper,—whereas the property *in queſtion*, (namely, *the property ſtolen*,) is protected on account of the right of the individual in a caſe of *conſumption* only; and there is no agreement between property which is protected in *two* ſituations, and property which is protected in *one* ſituation only:—but an agreement between the property in queſtion and the property for which ſatisfaction is required is indiſpenſable: it therefore appears that in a caſe of *conſumption* alſo the protection of the property ceaſes; and no ſatisfaction is due for it;—in the ſame manner as holds in a caſe of *deſtruction*.

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[*] That is, in the manner of *a tranſition of property.*

[†] *Arab. Mobâh*, i. e. *common property*, which it is lawful for any one, indifferently, to take and uſe.

[‡] in oppoſition to *Mobâh.*

One puniſhment anſwers to all the previous repetitions of the ſame offence;

If a perſon be repeatedly guilty of theft, and then ſuffer amputation for any particular theft, ſuch amputation takes place as anſwering to *all* the thefts: and there is no reſponſibility for the property ſtolen in any one of them, according to *Haneefa*. The two diſciples ſay and the thief is reſponſible for the property of all except the

cutor.

ſay that the thief is reſponſible for the property ſtolen in every theft excepting that for which he has ſuffered amputation.—This is where only *one* of the ſeveral owners is preſent.—If, however, they be *all* preſent, and the thief ſuffer amputation at the ſuit of the *whole*, in this caſe he is not reſponſible for any thing to any one of them, according to the united opinion of all the doctors.—The argument of the two diſciples is that the owner preſent is not the deputy of thoſe who are abſent; and proſecution by the proprietor is eſſential to the manifeſtation of theft; but, in the caſe in queſtion, proſecution does not appear on the part of thoſe who are *abſent*, wherefore the larciny of the thief is not eſtabliſhed with reſpect to *them*; their property, therefore, remains in protection, and hence ſatisfaction is due for it. The argument of *Haneefa* is that by all the thefts *one* amputation only is incurred as the right of GOD; becauſe, in puniſhments, the application is made as extenſive as poſſible,—(that is, one ſingle puniſhment ſuffices *.)—Now, as proſecution is conditional to the manifeſtation of the theft with the *Kâzee*, and as that has taken place, (and puniſhment for theft is incurred on account of the offence,) ſo when the *Kâzee* inflicts one ſingle puniſhment he inflicts the whole that is due; for it is evident that the advantage (namely *determent*) is reaped by all. The ſingle amputation, therefore, takes place as anſwering to *all* the thefts; and hence ſatisfaction is not due for any one of the properties ſtolen. The ſame difference of opinion obtains in a caſe where a thief repeatedly ſteals property from the ſame perſon, and that perſon proſecutes upon one of the thefts, and the thief ſuffers amputation for it:—that is, according to *Haneefa*, the thief is not reſponſible for the property ſtolen in any of the other inſtances;—but according to the two diſciples he is reſponſible.

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* In other words, *anſwers to all the previous repetitions of the ſame offence for which that puniſhment is inflicted.*

CHAP. V.

Of the Acts of a *Thief* with reſpect to the Property ſtolen.

Caſe of a thief [illegible] cloth ries it out of cuſtody.

If a thief ſteal a piece of cloth, and tear it in two, in the houſe of the owner of the cloth, and then take it out of the houſe, and carry it off, and the value of the cloth, after being thus divided, amount to ten *dirms*, the hand of the thief is to be ſtruck off. It is recorded from *Aboo Yooſaf* that his hand is not to be ſtruck off; becauſe, upon his dividing the cloth, a cauſe of his right of property in it appears, as the tearing of it in pieces * is a cauſe of right of property, on account of its ſubjecting him to reſponſibility for the value; thus the ſubject of reſponſibility becomes his property upon his making ſatisfaction for it to the owner. Where the thief, therefore, conveys the cloth out of the owner's houſe *after* having divided it, theft is not eſtabliſhed, ſince the thief here conveys out of the houſe a thing in which a cauſe of his right of property exiſts; and in ſuch a caſe the hand of a thief is not to be cut off; in the ſame manner as the hand is not cut off where the purchaſer of goods ſteals his purchaſe in which the ſeller happens to have a reſerve of option, as a cauſe of property exiſts in that inſtance;—and ſo alſo in the caſe in queſtion. *Haneefa*, on the other hand, argues that the taking of the cloth, together with the tearing of it in pieces, is a cauſe of *reſponſibility*, but not of *right of property*; for the only principle on which this right is eſtabliſhed, *after* making ſatisfaction, is that if it were not ſo, the compenſation, and the thing for which the compenſation is given, would be united in one ſtate of property; and this does not engender doubt, any more than the ſimple *taking*, without *tearing*: in other words, as the ſimple *taking away* is alſo, in ſome inſtances, a cauſe of right of property after ſatiſfaction being made, and yet does not engender doubt, ſo the taking with the tearing, which is a cauſe of reſponſibility, and, after ſatisfaction being made, becomes a cauſe of right of property, does not engender doubt. Similar to this is a caſe where the ſeller ſteals from the purchaſer damaged goods which he had ſold to him; for here his hand is to be cut off, although the cauſe of returning theſe goods, and therein, ultimately, the cauſe of the propriety reverting to the ſeller, be eſtabliſhed; for his hand is cut off notwithſtanding; and ſo likewiſe in the preſent caſe. This is contrary to what is adduced by *Aboo Yooſaf*, that "if a purchaſer ſteal his purchaſe in which the ſeller has a reſerve of option, his hand is not to be cut off," &c. ſince *ſale* is employed for the purpoſe of ſubſtantiating the right of property. The difference of opinion here recited obtains only where the owner of the cloth chuſes to take it back, together with ſatisfaction for the damage it has ſuſtained.—If, however, he chuſe to quit the cloth, and receive of the thief ſatisfaction for the *full value*, in this caſe his hand is not to be cut off, according to all our doctors, becauſe the thief is here conſidered as the proprietor of that cloth from the time of his taking it, in the manner of ſucceſſion*, and hence it is the ſame as if the proprietor were to make a gift of the property ſtolen to the thief, for there the thief's hand is not to be cut of becauſe of doubt, and ſo here likewiſe. All that has been here advanced proceeds upon a ſuppoſition that the cloth has, by tearing it, ſuſtained a *conſiderable* damage; for if the damage be *trifling*, the hand of the thief is cut off, according to all the doctors; becauſe in this caſe no cauſe of a right of property appears, ſince here it is not in the proprietor's power to take the whole value by way of ſatisfaction.

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* *Arab. Khark Fahiſh*; that is, *tearing* ſo as to deſtroy or depreciate the value of the article.

Killing an animal, and *then* ſtealing it does not

IF a thief lay his hands upon a goat, and cut its throat within the houſe of the owner, and then convey it forth, his hand is not to be cut off; becauſe in this caſe the theft is, in the end, a theft of *fleſh meat*; and the hand is not cut off for ſtealing fleſh meat.

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* That is in the way of *a tranſition of property*.

Caſe of a thief's converſion of *gold* or *ſilver* into *coin.*

If a man ſteal gold or ſilver, to ſuch an amount as would occaſion amputation, and then coin the ſame into *dirms*, or *deenârs*, his hand is to be cut off, and the *dirms* or *deenârs* are given to the perſon who had been robbed. This is the doctrine of *Haneefa.* The two diſciples ſay that the perſon who had been robbed is not entitled to take the *dirms* or *deenârs.* The difference of opinion here originates in a ſimilar difference of opinion in a caſe of *uſurpation.* Thus if a perſon were to uſurp *dirms* or *deenâars*, and afterwards convert them into *ornaments* (ſuch as *bracelets*, for inſtance) the proprietor's right in them is terminated, according to the two diſciples;—contrary to the opinion of *Haneefa.* In the ſame manner, alſo, in the caſe in queſtion, by converting the gold or ſilver into *dirms* or *deenârs*, the right of the perſon robbed is terminated, according to the two diſciples; contrary to the opinion of *Haneefa.* The reaſon of this difference of opinion is that workmanſhip is appreciable, with the two diſciples, but not with *Haneefa.* And here obſerve that, concerning amputation, in the caſe in queſtion, (judging from the opinion of *Haneefa*,) there can be no manner of demur, becauſe the thief is not *proprietor* of the *dirms* or *deenârs:* but ſome ſay that (judging by the opinion of the two diſciples) there can be no amputation, becauſe the thief has become proprietor of the coin previous thereto. Some again ſay that in the opinion of the two diſciples alſo amputation is incurred, becauſe the gold or ſilver has, by workmanſhip, become *another thing*, and the ſlave becomes proprietor of *that thing*, and not of the *actual thing* ſtolen, (namely, the *gold* or the *ſilver*;) and hence his hand muſt be cut off.

Caſe of a

If a perſon ſteal cloth, and dye it *red*, and afterwards ſuffer amputation for the theft, the cloth is not to be taken back from him; nor is the value to be taken from him by way of ſatisfaction. This is the doctrine of the two *Elders.* *Mahommed* ſays that the red cloth is to be taken from him, and he is paid for the expence of dying; in the ſame manner as where a perſon *uſurps* cloth, and afterwards dyes it, in which caſe the cloth is taken back from him, and he is paid, by the owner, ſuch additional value as the cloth has received in the dying, for this reaſon, that the cloth is the *original* article, and is ſtill exiſting, and the colour is a *dependant* upon it, whence a preference is given to the owner; the cloth is therefore returned to the owner, and the uſurper is paid the expence of dying; and ſo alſo, in the preſent caſe, becauſe here alſo the ſame reaſon exiſts. The argument of the two *Elders* is that the *colour* is extant both in *appearance*, and alſo in *reality*, whence, if the owner of the cloth were to take it back *dyed*, he is reſponſible for the acceſſion of value in conſequence of the dying; now the right of the owner of that cloth exiſts in the *appearance* of that cloth only, and not in the *reality* of it, (namely the *proprietary*,) becauſe, if the cloth were deſtroyed, the thief is not reſponſible; and ſuch being the caſe, a preference is given to the thief. It is otherwiſe in a caſe of *uſurpation*, ſince in that inſtance the right of the proprietor and alſo of the uſurper is extant and eſtabliſhed both in *appearance* and in *reality*, for which reaſon they are both upon a footing, whence a preference is given to the proprietor for the ſame reaſon as *Mohammed* gives the preference to him. What is now advanced applies ſolely to where the thief has procured the cloth to be dyed of a *red* colour: but if he were to get it dyed *black*, the cloth is taken from him, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* conceives this caſe to be the ſame with the preceding, becauſe he holds a *black* dye alſo to increaſe the value of the cloth, in the ſame manner as a *red* dye. With *Mohammed*, likewiſe, *black* is the ſame as *red*; yet that does not occaſion a termination of the proprietor's right, he being entitled to take back the cloth in either caſe. With *Haneefa*, on the contrary, *black* is in reality a *defect* in the cloth, and *therefore* does not occaſion a termination of the proprietor's right.

CHAP. VI.

Of *Katta-al-Tareek*, or *Highway Robbery.*

Deſcription of what conſtitutes a *highway robber.*

When a party go forth, prepared for oppoſition, (that is, enabled to repel the oppoſition of others,)—or, when a ſingle perſon goes forth, ready for oppoſition, from a confidence in his own proweſs,—with an intent to commit depredations on the highway, they are termed, in the *Arabick* language, *Kattâa-al-Tareek*[*], and in the *Perſian*, *Rah-Zin*; and the perſon upon whom a robbery is ſo committed is termed *Maktoo-ali-hee*[†].

Robbers are of four deſcriptions,

Highway robbers appear under four different deſcriptions or predicaments. First, thoſe who are ſeized before they have robbed or murdered any perſon, or put any perſon in fear: secondly, thoſe who are ſeized after having only *robbed* a *Muſſulman* or an infidel ſubject:—thirdly, thoſe who are ſeized after having committed *murder* only without *robbing*: and fourthly, thoſe who are ſeized after having committed both *murder* and *robbery.* The law with reſpect to theſe in the *firſt* predicament is that the magiſtrate ſhall confine them in priſon until their repentance be evident,—(that is, until it be known from their demeanor that they have repented, by the marks of repentance and contrition appearing in their countenances.) With reſpect to thoſe in the *ſecond* predicament, the law is that the magiſtrate ſhall ſtrike off their right hand and left foot, provided the property taken be of ſuch value as when divided amongſt the whole, would afford to each to the amount of ten *dirms.* (The *right*

and puniſhable by *impriſonment,*

or, by amputation of the *right hand* and *left foot,* hand and *left* foot are here particularly ſpecified, becauſe, if the hand and foot were both taken from *one ſide*, one of the faculties would be totally deſtroyed, which amounts to *killing*, and the law does not award robbers of this deſcription to be put to death.) With reſpect to thoſe in the *third* predicament, the law is that the *Kâzee* ſhall put them to death [*], by way of *puniſhment*; whence, if the *Wallee-ad-dam* or avenger of blood forgive them, no regard is paid to his forgiveneſs, *puniſhment* being a right of GOD [†]. (The rule with reſpect to thoſe three deſcriptions is founded on a text of the *Koran*, as the paſſage which occurs upon this head evidently points to the rules here ſpecified. Let it alſo be obſerved that the intent of the words "after "having robbed a *Muſſulman* or an *infidel ſubject*,"—is that the property may appear protected under a *laſting* protection [‡]: if, therefore, a robber take the property of an *alien*, in the way of *highway robbery*, amputation of the hand and foot is not to be inflicted upon him.) The law with reſpect to theſe in the *fourth* predicament is that the magiſtrate has it in his option to puniſh them in which ever way he ſees beſt: if he pleaſe, he may firſt cut off a hand and foot and then put them to death, or crucify them; or, if he pleaſe, he may put them to death at once, without inflicting amputation. *Mohammed* holds that the magiſtrate has it at his choice either to put them immediately to death, or to crucify them; but that he is not at liberty to inflict amputation upon them *likewiſe*; becauſe highway robbery is a ſingle offence, and therefore cannot occaſion two puniſhments; and alſo becauſe, in *puniſhment*, robbery *without* violence to the perſon is included in the *murder* of the perſon, (whence it is that if a thief, being married, were

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[*] Literally, "*Infeſters of the highway.*"

[†] Literally, *the depredatee.*

or by

or by *fixion*, or immediate *death*, with or without amputation, at the diſcretion of the magiſtrate.

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[*] Executed either by *hanging* or *beheading*.

[†] In oppoſition to *retaliation*, which being a right of the *individual*, may either be forgiven, or remitted for a compoſition.

[‡] In oppoſition to the property of an *alien*, which is in *protection* only during his *Amân*, (or *protection* under which aliens are permitted to remain in a *Muſſulman* territory for the ſpace of one year.)

to commit *whoredom* he ſuffers *lapidation* only, and not *amputation.*) The argument of *Haneefa* and *Aboo Yooſaf* is that the infliction in queſtion (namely death or crucifixion, together with amputation,) is only a *ſingle puniſhment*, more ſevere than ordinary, on account of the ſuperior atrocity of its cauſe, (namely, *a complete obſtruction of the peace off the highway, by murdering a perſon, and then carrying off his property,*)—whence it is that cutting off the right hand and left foot conſtitutes only a *ſingle* puniſhment with reſpect to a highway robber, whereas, with reſpect to a *common thief*, who is not a *highway robber*, it would be *two* puniſhments; and a variety of crimes can only be comprehended in a *numerous*, but not in a *ſingle* puniſhment. It is to be obſerved that *Kadooree*, in his abridgement of his own work, has mentioned that it is in the option of the magiſtrate either to expoſe the body upon a croſs, after putting to death the robber, or to leave it. It is recorded from *Aboo Yooſaf* that the body muſt not be left uncrucified, becauſe *crucifixion* is particularly mentioned in the ſacred writings, and the deſign of it is *publicity*, in order that others may take warning by it. Lawyers report, from *Haneefa*, that *publicity* is fully obtained by *putting to death*, the *crucifixion* being only by way of aggravation, wherefore the magiſtrate has it in his option either to aggravate or not. Again, *Kadooree* ſays that the highway robber in queſtion is to be crucified *alive*, and then to be ſlain by thruſting a ſpear through his body: and the ſame is recorded from *Koorokhee*. It is recorded from *Tehâvee* that he muſt firſt be ſlain and then crucified; but the preceding opinion [of *Koorokhee*] is moſt approved, becauſe crucifying in the way there mentioned is calculated to excite men's fears moſt forcibly, which is the deſign. It is alſo requiſite that the body of the criminal be not ſuffered to remain longer than *three days* upon the croſs, becauſe by that time it becomes putrid and conſequently noxious. *Aboo Yooſaf* ſays that it ought to remain there until it fall to pieces, for the more ſtriking example: to this, however, it may be replied that the example is ſufficiently made by an expoſure of *three days*.

Satisfaction for the property taken

IF a highway robber be put to death, ſatisfaction for the property he had taken is not due from him, becauſe of the analogy which this bears to *theft*, in which the ſame rule obtains, as has been already ſtated.

Murder committed by any *one* of a band of robbers ſubjects the whole to the penalty of murder.

IF any one among a band of robbers be guilty of *murder*, the puniſhment for it is inflicted upon the *whole*, becauſe the puniſhment is in this inſtance conſidered as a penalty for the aſſault of *the whole*, which is eſtabliſhed by each of them being aiding and abetting to the other; (whence if any of them, in fighting, be hard preſſed, the others aſſiſt him;) and the condition upon which the puniſhment is inflicted on them is this, that murder be committed by *any one* of them, which is the caſe here. Let it alſo be obſerved that it is the ſame whether the murder be committed with a *club*, a *ſtone*, or a *ſcymitar*, becauſe *highway robbery* is equally eſtabliſhed in all theſe caſes.

jects to *retaliation* or *fine*;

IF a robber be taken who has neither *murdered* nor *plundered*, but only *wounded* a perſon or perſons, in this caſe retaliation is exacted of him, where there is retaliation*, or a fine, where there is fine†. —The exaction of retaliation or fine is committed to thoſe who are entitled to claim it, becauſe in the offence in queſtion there is no *puniſhment*, whence it is evident that theſe are a right of the *individual*, and hence *he* is to exact it to whom the right appertains, namely, the *Wakee Janâyat* or perſon upon whom the offence has been committed.

but not if at-

IF a robber be ſeized who has both *plundered* and *wounded* any perſon or perſons, his hand and foot are to be cut off; but the perſonal injury ſuſtained from him is remitted, (that is, neither *fine* nor *retaliation* are incurred;)—becauſe, where *puniſhment* is incurred *as a right of* the protection, in behalf of the i of every thing ſhort of the *whole perſon*, ceaſes in the ſame as the protection of *property* ceaſes.

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* As in caſe of the loſs of any *limb* or *organ*.

† As in caſe of *cuts* or *bruiſes*.

fore he is ſeized, is not liable to *pu-*

ger of the of-fence is at li-berty to exact

give, the rob-ber is reſpon-ſible for the value of the articles taken.

If a robber be taken after having repented, and he ſhould have been guilty of both *robbery* and *murder*, in this caſe the *Walee Janáyet* or avenger of the offence has it in his option either to ſlay him, in retaliation, or to forgive him; becauſe, in the offence of highway robbery, puniſhment is not to be awarded after repentance, according to what is written in the *Koran*, "PUNISHMENT SHALL BE INFLICTED UPON THEM, EXCEPTING SUCH AS REPENT BEFORE THE MAGISTRATE LAYS HIS HANDS UPON THEM;" and alſo, becauſe repentance only can be confirmed by the robber returning the goods he had taken to their proper owner; in which caſe amputation is not incurred*: but amputation not being incurred, it neceſſarily follows that the right of the *individual* holds in reſpect both to *perſons* and *property*: the avenger of the offence is therefore at liberty either to exact retaliation or to forgive; and if he forgive, the robber remains reſponſible for the property taken, whether it be deſtroyed in his hands, or conſumed by him.

The actual perpetrator

party from puniſhment.

If, among a party of robbers, there happen to be an *infant* or a *lunatic*, or a prohibited relation of the perſon robbed, in this caſe puniſhment is remitted, not only with reſpect to this perſon, but alſo with reſpect to all the reſt of the party. What is now advanced concerning an *infant* and *lunatic* is the opinion of *Haneefa* and *Ziffer*. It is recorded from *Aboo Yooſaf* that this rule obtains only where the infant, or the lunatic, is the actual perpetrator of the murder or robbery: but if the actual perpetrator be of mature age and ſound underſtanding, in this caſe puniſhment is inflicted upon the reſt of the party alſo, although there be an infant or a lunatic among them;—but yet puniſhment is not inflicted upon the infant or the lunatic. The ſame difference of

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* See p. 116.

opinion

obtains in a caſe of theft committed by a party, of whom ſome infants or lunatics;—that is, (according to *Haneefa* and *Ziffer*,) puniſhment is remitted with reſpect to the whole. The rule is the ſame with *Aboo Yooſaf* likewiſe,—provided that only the *lunatics* or *infants* carry forth the property out of the owner's houſe, and not the *others*; but if the *reverſe* be the caſe, puniſhment is not remitted with reſpect to ſuch of the party as are *ſane* or *adult*. The argument of *Aboo Yooſaf* is that the perpetrator is a *principal*, and the aſſiſtant a *dependant* only: now where the perpetrator is poſſeſſed of underſtanding, there can be no demur reſpecting the *principal*; nor, in fact, can any demur exiſt but with reſpect to the *dependant*; and that is not regarded: but if the caſe be reverſed, puniſhment is remitted in reſpect to the *whole*, becauſe here the demur concerns the *principal*.—The argument of *Haneefa* and *Ziffer* is that *highway-robbery* is a ſingle offence, committed by the whole of the party, and that is the cauſe of the puniſhment; but where it happens that the act of *ſome* of them is not an occaſion of puniſhment, the act of the others is then only a *part* of the cauſe, and an effect cannot be eſtabliſhed by a *part* of a cauſe; in the ſame manner as where two perſons kill a man by one of them ſtriking him *wilfully*, and the other *accidentally*, in which caſe retaliation does not take place; as the act of the perſon who ſtruck *wilfully* is only a *part* of the cauſe; and ſo in this caſe likewiſe.—With reſpect to the words "or a *pro-hibited relation* of the perſon robbed,"—ſome obſerve that this deſcription applies ſolely to a caſe where the property may be held in common between ſuch prohibited relation and the perſon robbed*; whilſt others maintain that the application is general, and not reſtricted to this particular caſe; and this is approved, becauſe highway-robbery is a ſingle offence, committed by the whole, and hence a prevention of puniſhment in reſpect to any *any one* of them occaſions the prevention of it in reſpect to the *remainder*.

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* Such as between a *father* and *ſon*. (See *Imbiſât*.)

Objection.—Highway robbery committed on a *Mooſtâmin*[*] is is not an occaſion of puniſhment any more than where it is committed upon a prohibited relation; and as the circumſtance of a prohibited relation being of a caravan robbed would occaſion the remiſſion of puniſhment, it would alſo follow that the circumſtance of a *Mooſtâmin* being in the ſame caravan is likewiſe an occaſion of puniſhment being remitted: this, however, is not the caſe, as by the commiſſion of a robbery upon a caravan puniſhment is incurred, although there be a *Mooſtâmin* along with it.

Reply.—Highway robbery committed on a *Mooſtâmin* is not an occaſion of puniſhment, becauſe of a doubt exiſting with reſpect to the protection of his life and property: but this reaſon is reſtricted peculiarly to a *Mooſtâmin.*—It is otherwiſe where a prohibited relation happens to be in the caravan; ſince, from his being there, a doubt ariſes reſpecting the *cuſtody*, as a whole *caravan* conſtitutes one ſingle cuſtody, in the ſame manner as a ſingle *houſe*, and hence by taking property from the caravan puniſhment is not incurred; in the ſame manner as where a perſon ſteals the property of his relation, and alſo the property of a ſtranger, from a houſe in which the relation and ſtranger reſide together; in which caſe his hand is not cut off, on account of a doubt reſpecting the *cuſtody*; and ſo here likewiſe. As puniſhment, however, in the caſe under conſideration, is remitted, it follows that the right of the individual takes place, according to what was before ſtated; and hence, if the robber ſhould have committed murder, the avengers of the offence have it in their option either to put the murderer to death, or to forgive him.

Robbery committed by

If ſome of the travellers in a caravan commit a robbery upon others of the ſame caravan, puniſhment is not incurred by them; becauſe a caravan conſtitutes a ſingle cuſtody, like a ſingle houſe; and as, if one of two perſons living in the ſame houſe were to ſteal property belonging to the other out of that houſe, puniſhment for theft is not to be inflicted upon him, ſo here likewiſe.

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[*] An alien infidel, who, not being a fixed reſident of the *Muſſulman* government, has yet a temporary protection from it, (never exceeding the ſpace of *one year*,) either as a fugitive from his own nation, or as a merchant, or as having been deputed on a particular commiſſion. (They are particularly treated of in the next book.)

A robbery com [illegible] *night* [illegible] *day* within an inhabited place,) does not occaſion puniſhment;

If a perſon commit a highway-robbery by *night*,—or by *day* within a *city*, or in *Koofa*, or *Heera* *,—this perſon is not accounted a *robber*, on a favourable conſtruction.—Analogy would require that he be conſidered as a *robber*, (and ſuch is the opinion of *Shafeï*,) becauſe an intention of *robbery* here evidently appears.—It is recorded from *Aboo Yooſaf* that puniſhment is incurred by him where he commits a robbery *without* the precincts of the city, although it be in the neighbourhood of it, becauſe there no aſſiſtance can be had: and he further aſſerts that if robbers make an affray in the city, during the day-time, with deadly weapons,—or if they make an affray during the *night*, either with deadly weapons, or with ſticks and ſtones,—they are to be accounted as *highway-robbers*, becauſe *deadly* weapons are too quick in their effect to admit of aſſiſtance coming, and in the night-time aſſiſtance comes ſlowly.—The reaſon for a more favourable conſtruction of the fact here is, that highway-robbery ſignifies *attacking people upon the highway*, which does not apply to *cities*, or inhabited places in their vicinity, becauſe it is evident that in ſuch places aſſiſtance may be procured; the perſons in queſtion, therefore, are not *highway-robbers*, and hence puniſhment is not inflicted upon them.—They muſt, however, be conſtrained to make reſtitution of the property taken, in ſuch a manner that the claimant may obtain his right: and they are alſo to be corrected and impriſoned, as they have committed an offence. If, moreover, they have ſlain any perſon, proſecution for

but the thieves are accountable for the property they take, as well as for any violence they

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* *Heera* means, generally, any incloſure.—In the preſent caſe it is ſaid to allude to a particular *Manzil*, (or reſting place for travellers,) near *Koofa*, conſtructed by *Namân Bin Mandar*, in which the lodges, although not *touching*, are yet all *near* each other.

that

may have committed.

that is committed to the avenger of blood for the reaſons before ſtated.—It is to be obſerved, however, that decrees have paſſed according to the opinion of *Aboo Yooſaf*, as appears in the *Fattahal-Takdeer*, copied from *Tahâvee*.

Caſe of *ho-*

If a perſon provoke another to ſuch a degree that he ſlays him, the *Deyit*, or fine of blood, falls upon the tribe of the ſlayer, according to *Haneefa*.—(This is a caſe of *homicide upon provocation*, which will be hereafter more fully treated of under the head of *Deyit*.)—If, however, a man *repeatedly* act thus, he muſt be put to death for it, as he is a common nuiſance in the land of God, wherefore his iniquity muſt be removed by deſtroying him.

HEDÂYA.

BOOK IX

AL SEYIR, or the

SEYIR is the plural of *Seerit*, which, in its primitive ſenſe, ſignifies *regulation*, in matters ſpiritual and temporal.—*Seyir*, in the language of the LAW, more eſpecially applies to the inſtitutes of the *prophet* in his wars.

Definition of *Seyir.*

Chap. I. Introductory.
Chap. II. Of the manner of waging war.
Chap. III. Of making peace, and concerning the perſons to whom it is lawful to grant protection.
Chap. IV. Of Plunder, and the diviſion thereof.
Chap. V. Of the Conqueſts of Infidels.

Chap. VI. Of the Laws concerning *Mooſtâmins*.
Chap. VII. Of *Tithe* and *Tribute*.
Chap. VIII. Of *Jizyat*, or Capitation Tax.
Chap. IX. Of the Laws concerning Apoſtates.
Chap. X. Of the Laws concerning Rebels.

CHAP. I.

War muſt be carried on [illegible] the infidels, at all times, by ſome party of *Muſſul*-[illegible]*ns*.

THE ſacred injunction concerning war* is ſufficiently obſerved when it is carried on by any one *party* or *tribe* of *Muſſulmans*; and it is then no longer of any force with reſpect to the reſt. It is eſtabliſhed as a divine ordinance, by the word of GOD, who has ſaid, in the *Koran*, "SLAY THE INFIDELS †; and alſo by a ſaying of the prophet, "*war is permanently eſtabliſhed until the day of judgment*," (meaning the *ordinance* reſpecting war.) The obſervance, however, in the degree above mentioned ſuffices; becauſe *war* is not a *poſitive* injunction ‡, as it is, in its nature, murderous and deſtructive, and is *enjoined* only for the purpoſe of advancing the true faith, or repelling evil from the ſervants of God; and when this end is anſwered by any ſingle tribe or party of *Muſſulmans* making war, the obligation is no longer binding upon the reſt; in the ſame manner as in the prayers for the dead*; (if, however, no one *Muſſulman* were to make war, the whole of the *Muſſulmans* would incur the criminality of neglecting it;) and alſo, becauſe, if the injunction were *poſitive*, the whole of the *Muſſulmans* muſt conſequently engage in war, in which caſe the materials for war (ſuch as *horſes*, *armour*, and ſo forth) could not be procured.—Thus it appears that the obſervance of war, as aforeſaid, ſuffices, except where there is a *general ſummons*, (that is, where the infidels invade a *Muſſulman* territory, and the *Imâm* for the time being iſſues a general proclamation, requiring all perſons to ſtand forth to fight,) for in this caſe war becomes a poſitive injunction with reſpect to the whole of the inhabitants, whether *men* or *women*, and whether the *Imâm* be a *juſt* or an *unjuſt* perſon: and if the people of that territory be unable to repulſe the infidels, then war becomes a poſitive injunction with reſpect to all in that neighbourhood; and if theſe alſo do not ſuffice, it then becomes a poſitive injunction with reſpect to the next neighbours; and in the ſame manner, with reſpect to all the *Muſſulmans*, from *eaſt* to *weſt*.

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* Meaning the *Jihâd Farz*, or *ordained* war, enjoined, in various paſſages of the *Koran*, to be waged againſt infidels. It is termed, by ſome, *the* HOLY *war*.

† Arab. *Mooſharikeen*; literally, *aſſociators*; i. e. *polytheiſts*, or *idolators*.

‡ Arab. *Farz Ain*. This is a technical expreſſion which cannot well be tranſlated: it means an injunction or ordinance unconditional in its nature, and general in its application, and the obligation of which extends alike to every individual. Thus *faſting* and *prayer* are of the claſs of *Farz Ain*: in oppoſition to ſuch duties as are merely *conditional* and *occaſional*.

Infidels may be attacked without provocation.

The deſtruction of the ſword † is incurred by infidels, although they be not the firſt aggreſſors, as appears from various paſſages in the ſacred writings which are generally received to this effect.

War is not a duty required of *infants*,

It is not incumbent upon *infants* to make war, as they are objects of compaſſion: neither is it incumbent upon *ſlaves*, or *women*, as the right of the maſter or of the huſband have precedence: nor is it ſo upon the *blind*, the *maimed*, or the *decrepid*, as ſuch are incapable.

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* All *Muſſulmans* are directed to pray for the dead: but the injunction is ſufficiently fulfilled by the act of the *Imâm*, or the relations or *Mawlas* of the deceaſed.

† Arab. *Kattâl*; meaning war in its *operation*, ſuch as *fighting*, *ſlaying*, &c,

women, or *ſlaves,* unleſs in caſe of *invaſion.*

If, however, the infidels make an attack upon a city or territory, in this caſe the repulſion of them is incumbent upon *all Muſſulmans,* inſomuch that a wife may go forth without the conſent of her huſband, and a ſlave without the leave of his maſter, becauſe war then becomes a *poſitive injunction,* and poſſeſſion either by bondage or by marriage cannot come in competition with a *poſitive injunction,*—as in *prayer* (for inſtance) or *faſting.*—This is ſuppoſing a *general ſummons*; for, before that, it is not lawful for a woman or ſlave to go forth to make war without the conſent of the huſband or maſter, as there is, in this caſe, no neceſſity for their aſſiſtance, ſince others ſuffice; and hence no reaſon exiſts for deſtroying the right of the huſband or maſter on that account.

No extraordinary exactions muſt be levied, whilſt there

If there be any fund in the public treaſury, ſo long as the fund laſts, any extraordinary exactions* for the ſupport of the warriors is abominable; becauſe ſuch exaction reſembles a *hire* for that which is *a ſervice of* God, as much as *prayer* or *faſting*; and hire being forbidden in theſe inſtances, ſo is it in that which reſembles them.—In this caſe, moreover, there is no occaſion for any extraordinary exaction, ſince the funds of the public treaſury are prepared to anſwer all emergencies of the *Muſſulmans,* ſuch as *war,* and ſo forth. If, however, there be no funds in the public treaſury, in this caſe the *Imâm* need not heſitate to levy contributions for the better ſupport of the warriors; becauſe, in levying a contribution, the greater evil (namely, the deſtruction of the perſon) is repelled; and the contribution is the ſmaller evil; and the impoſition of a *ſmaller* evil, to remedy a *greater,* is of no conſequence. A confirmation of this is found in what is related of the prophet, that he took various articles of armour, and ſo forth, from *Sifwan* and *Omar:* in the ſame manner, alſo, he took property from married men, and beſtowed it upon the unmarried, in order to encourage them, and enable them to go forth to fight with chearfulneſs;—and he alſo uſed to take the horſes from thoſe who remained at home, and beſtowed them upon thoſe who went forth to fight, on foot.

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* Arab. *Joal*; meaning an extraordinary donation or reward.

CHAP. II.

Of the Manner of Waging War.

Infidel be [illegible] upc brace the faith;

WHEN the *Muſſulmans* enter the enemy's country, and beſiege the cities or ſtrong holds of the infidels, it is neceſſary to invite them to embrace the faith, becauſe *Ibn Abbas* relates of the prophet that "he "never deſtroyed any without previouſly inviting them to embrace "the faith." If, therefore, they embrace the faith, it is unneceſſary to war with them, becauſe that which was the deſign of the war is then obtained without war. The prophet, moreover, has ſaid "*we* "*are directed to make war upon men until ſuch time as they ſhall confeſs* "THERE IS NO GOD BUT ONE GOD; *but when they repeat this creed,* "*their perſons and properties are in protection.*"—If they do not accept the call to the faith, they muſt then be called upon to pay *Jizyat*, or capitation-tax *; becauſe the prophet directed the commander of his armies ſo to do; and alſo, becauſe by ſubmitting to this tax, war is forbidden and terminated, upon the authority of the *Koran*. (This call to pay capitation tax, however, reſpects only thoſe from whom the capitation-

and, if they [illegible]

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* Tribute from the *perſon*, in the ſame manner as *Khirâj* is tribute from *lands*.

capitation-tax is acceptable; for as to apoſtates and the idolaters of Arabia, to call upon them to pay the tax is uſeleſs, ſince nothing is accepted from them but embracing the faith, as it is thus commanded in the *Koran*.)—*If* thoſe who are called upon to pay capitation-tax conſent to do ſo, they then become entitled to the ſame protection, and ſubject to the ſame rules as *Muſſulmans*, becauſe *Alee* has declared "*Infidels agree to a capitation-tax only in order to render their* "*blood the ſame as Muſſulman blood, and their property the ſame as* "*Muſſulman property*."

the faith, previous to making war upon them:

It is not lawful to make war upon any people who have never before been called to the faith, without previouſly requiring them to embrace it; becauſe the prophet ſo inſtructed his commanders, directing them "*to call the* INFIDELS *to the faith*;" and alſo, becauſe the people will hence perceive that they are attacked for the ſake of *religion*, and not for the ſake of *taking their property*, or *making ſlaves of their children*, and on this conſideration it is poſſible that they may be induced to agree to the call, in order to ſave themſelves from the troubles of war.

but if infidels be attacked and ſlain *without* this obſervance, no *fine*, &c. is due.

If a *Muſſulman* attack infidels without previouſly calling them to the faith, he is an offender, becauſe this is forbidden: but yet, if he do attack them before thus inviting them, and ſlay them, and take their property, neither *fine*, *expiation*, or *atonement* are due, becauſe that which protects, (namely, *Iſlam*,) does not exiſt in them, nor are they under protection by *place*, (namely, the *Muſſulman territory*,) and the mere *prohibition* of the act is not ſufficient to ſanction the exaction either of fine, or of atonement for property: in the ſame manner as the ſlaying of the *women* or *infant children* of infidels is forbidden; but if, notwithſtanding, a perſon were to ſlay ſuch, he is not liable to a fine.

It is laudable to call to the faith a people to whom a call has already come, in order that they may have the more full and ample warning: but yet this is not *incumbent*, as it appears in the *Nakl-Saheeh* that the prophet plundered and deſpoiled the tribe of *Mooſtlick* by ſurpriſe; and he alſo agreed, with *Aſáma*, to make a predatory attack upon *Cobna* at an early hour, and then to ſet it on fire; and ſuch attacks are not preceded by a *call*. (*Cobna* is a place in *Syria*:—ſome aſſert it is the name of a *tribe*.)

On infidels re-
the faith, or to pay tribute, they may be attacked.

If the infidels, upon receiving the call, neither conſent to it, nor agree to pay capitation-tax, it is then incumbent on the *Muſſulmans* to call upon God for aſſiſtance, and to make war upon them; becauſe God is the aſſiſtant of theſe who ſerve him, and the deſtroyer of his enemies, the infidels; and it is neceſſary to implore his aid upon every occaſion; the prophet, moreover, commands us ſo to do.—And having ſo done, the *Muſſulmans* muſt then, with God's aſſiſtance, attack the infidels with all manner of warlike engines, (as the prophet did by the people of *Tayeef*,) and muſt alſo ſet fire to their habitations, (in the ſame manner as the prophet fired *Baweera*,) and muſt inundate them with water, and tear up their plantations, and tread down their grain; becauſe by theſe means they will become weakened, and their reſolution will fail, and their force be broken; theſe means are, therefore, all ſanctified by the LAW.

The uſe of *miſſile* weapons is allowable, although there be *Muſſulmans* amongſt the infidels;

It is no objection to ſhooting arrows, or other miſſiles, againſt the infidels, that there may chance to be among them a *Muſſulman* in the way either of *bondage* or of *traffic*; becauſe the ſhooting of *arrows* and ſo forth among the infidels remedies a *general* evil, in the repulſion thereof from the whole body of *Muſſulmans*; whereas the ſlaying of a *Muſſulman* ſlave or trader is only a *particular* evil; and to repel a *general* evil a *particular* evil muſt be adopted; and alſo, becauſe it ſeldom happens that the ſtrong holds of the infidels are deſtitute of *Muſſulmans*, ſince it is moſt probable that there are *Muſſulmans* reſiding in them, either in the way of *bondage* or of *traffic*:

and hence, if the uſe of *miſſile* weapons were prohibited on account of theſe *Muſſulmans*, war would be

or, although the infidels place *Muſſul-*

fight.

If the infidels, in time of battle, ſhould make ſhields *man* children, or of *Muſſulmans* who are priſoners in their hands, yet there is no occaſion, on that account, to refrain from the uſe of miſſile weapons, for the reaſon already mentioned. It is requiſite, however, that the *Muſſulmans*, in uſing ſuch weapons, aim at the *infidels*, and not at the *children* or the *Muſſulman captives*; becauſe, as it is impoſſible, in ſhooting, to diſtinguiſh preciſely between them and the infidels, the perſon who diſcharges the weapon muſt make this diſtinction in his *intention* and *deſign*, by *aiming* at the *infidels*, and not at the *others*, ſince thus much is practicable, and the diſtinction muſt be made as far as is practicable. There is alſo neither *fine* nor *expiation* upon the warriors on account of ſuch of their arrows or other miſſiles as happen to hit the children or the *Muſſulmans*, becauſe the war is in obſervance of a divine ordinance, and atonement is not due for any thing which may happen in the fulfilment of a divine ordinace, for otherwiſe men would neglect the fulfilment of the ordinance from an apprehenſion of becoming liable to atonement. It is otherwiſe in the caſe of a perſon eating the bread of another when periſhing for hunger, as in that inſtance atonement is due although eating the bread of other people, in ſuch a ſituation be a divine ordinance*; becauſe a perſon periſhing for hunger will not refrain from eating the proviſion of another, from the apprehenſion of atonement, ſince his life depends upon it; whereas *war* is attended with trouble, and dangerous to life; whence men would be deterred, by apprehenſion of atonement, from engaging in it.

Warriors may carry their

There is no objection to the warriors carrying their *Korans* and their women along with them, where the *Muſſulman* force is conſiderable, to ſuch a degree as to afford a protection from the enemy, and not to admit of any apprehenſion from them, becauſe in that caſe ſafety is moſt probable, and a thing which is *moſt probable* ſtands and is accounted as a thing *certain*.

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* That is to ſay, is enjoined and authoriſed in the *ſacred writings*.

men into the field along with them.

IF the force of the warriors be ſmall, (ſuch as is termed a *Sirreeyat*[*],) ſo as not to afford ſecurity from the enemy, in this caſe their carrying their women or *Korans* along with them is reprobated; becauſe, in ſuch a ſituation, taking thoſe with them is expoſing them to diſhonour; and taking the *Koran* with them, in particular, is expoſing it to contempt, ſince infidels ſcoff at the *Koran* with a view of inſulting the *Muſſulmans*; and this is the true meaning of the ſaying of the prophet "*Carry not the* KORAN *along with you into the territory of the enemy*," (that is, of the *infidels*.)

unleſs the force be ſo ſmall as not to place them in *ſecurity*.

IF a *Muſſulman* go into an infidel camp, under a protection, there is no objection to his taking his *Koran* along with him, provided theſe infidels be ſuch as obſerve their engagements, becauſe from theſe no violence is to be apprehended.

IT is lawful for aged women to accompany an army, for the performance of ſuch buſineſs as ſuits them, ſuch as dreſſing victuals, adminiſtering water, and preparing medicines for the ſick and wounded;—but with reſpect to *young* women, it is better that they ſtay at home, as this may prevent perplexity or diſturbance. The women, however, muſt not engage in fight, as this argues *weakneſs* in the *Muſſulmans*; women, therefore, muſt not take any perſonal concern in battle unleſs in a caſe of *abſolute neceſſity*: and it is not laudable to carry *young* women along with the army, either for the purpoſe of carnal gratification, or for ſervice: if, however, the neceſſity be *very urgent*, *female ſlaves* may be taken, but not *wives*.

Aged women may accompany the

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[*] A cohort; a body of men from 300 to 500.

muſt not fight

A wife muſt not engage in fight but with the conſent of her huſband, nor a ſlave, but with the conſent of his owner, (according to what was already ſtated, that "the right of the huſband and the maſter has precedence,") unleſs from neceſſity, where an attack is made by the enemy.

ken, &c.

It does not become *Muſſulmans* to break treaties, or to act unfairly with reſpect to plunder, or to disfigure people (by cutting off their ears and noſes, and ſo forth;) for as to what is related of the prophet, that he disfigured the *Oorneans*, it is abrogated by ſubſequent prohibitions.—(The hiſtory of the *Oorneans* is this. A party of the inhabitants of *Oorna* came to *Medina*, and there took oaths [of fidelity] to the prophet, and afterwards fell ſick, upon which the prophet ſent them to his camel ſtables, directing them to live upon camel's milk; but when they recovered they ſlew the camel-keepers, and carried off the camels; and the prophet diſpatched people after them by night, who overtook them, and cut off their ears and noſes by the prophet's order.)—In the ſame manner, it does not become *Muſſulmans* to ſlay women or children, or men aged, bed-ridden, or blind, becauſe *oppoſition* and *fighting* are the only occaſions which make ſlaughter allowable, (according to our doctors,) and ſuch perſons are incapable of theſe. For the ſame reaſon alſo, the *paralytic* are not to be ſlain, nor thoſe who are diſmembered of the right hand, or of the right hand and left foot. *Shafeï* maintains that aged men, or perſons bed-ridden or blind may be ſlain; becauſe (according to him) *infidelity* is an occaſion of ſlaughter being allowable; and this appears in theſe perſons. What was before obſerved, however, that "the "*paralytic* or *diſmembered* are not to be ſlain," is in proof againſt him, as *infidelity* appears in theſe alſo, yet ſtill they are not ſlain, whence it is evident that mere *infidelity* is not a juſtifiable occaſion of ſlaughter. The prophet, moreover, forbad the ſlaying of *infants* or *ſingle perſons**; and once, when the prophet ſaw a woman who was

Women, children, or diſabled perſons, muſt not be ſlain;

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* *Arab. Zirrât*; meaning *ſcattered about at random.*

ſlain, he ſaid, "*Alas! this woman did not fight: why, therefore, was* "*ſhe ſlain?*"—But yet, if any of theſe perſons be killed in war, or if a woman be a *queen* or *chief*, in this caſe it is allowable to ſlay them, they being qualified to moleſt the ſervants of God.—So alſo, if ſuch perſons as the above ſhould *attempt* to fight, they may be ſlain, for the purpoſe of removing evil, and becauſe fighting renders ſlaying allowable.

unleſs they be in a ſituation to annoy the *Muſſulmans*.

A LUNATIC muſt not be ſlain unleſs he fight, as ſuch a perſon is not reſponſible for his faith: but yet where he is found fighting it is neceſſary to ſlay him, for the removal of evil. It is alſo to be obſerved that infants or lunatics may be ſlain ſo long as they are actually engaged in fight, but it is not allowed to kill them after they are taken priſoners: contrary to the caſe of *others*, who may be ſlain even after they are taken, as they are liable to puniſhment, becauſe they are reſponſible for their faith.

Lunatics muſt

A PERSON who is inſane *occaſionally*, ſtands, during his lucid intervals, in the ſame predicament as a *ſane* perſon.

IT is abominable in a *Muſſulman* to *begin* fighting with his father who happens to be among the infidels; nor muſt he ſlay him; becauſe God has ſaid, in the *Koran*, "HONOUR THY FATHER AND THY "MOTHER;" and alſo, becauſe the preſervation of the father's life is incumbent upon the ſon, according to *all* the doctors; and the permiſſion to *fight* with him would be repugnant to that ſentiment. If, alſo, the ſon ſhould find the father, he muſt not ſlay him *himſelf*, but muſt hold him in view until ſome other come and ſlay him, for thus the end is anſwered without the ſon ſlaying his father, which is an offence. If, however, the father attempt to ſlay the ſon, inſomuch that the ſon is unable to repel him but by killing him, in this caſe the ſon need not heſitate to ſlay him; becauſe the deſign of the ſon is merely to *repel* him, which is lawful; for if a *Muſſul-*

muſt not fight with his father,

nor ſlay him, but in *ſelf-defence*.

man

were to draw his ſword with a deſign of killing his ſon, in ſuch a way as that the ſon is unable to repel him but by killing him, it is then lawful for the ſon to ſlay his father, becauſe his deſign is merely *repulſion*; in a caſe therefore where the father is an *infidel*, and attempts to ſlay his ſon, it is lawful for the ſon to ſlay the father in ſelf-defence, *a fortiori*.

CHAP. III.

Of making Peace; and concerning the Perſons to whom it is lawful to grant Protection.

be ere it is adviſe- able:

IF the *Imâm* make peace with aliens*, or with any particular tribe or body of them, and perceive it to be eligible for the *Muſſulmans*, there need be no heſitation; becauſe it is ſaid, in the *Koran*, "IF THE INFIDELS BE INCLINED TO PEACE, DO YE LIKEWISE "CONSENT THERETO;"—and alſo, becauſe the prophet, in the year of the puniſhment of *Eubea*, made a peace between the *Muſſulmans* and the people of *Mecca* for the ſpace of *ten years*; *peace*, moreover, is *war* in effect, where the intereſt of the *Muſſulmans* requires it, ſince the deſign of war is the removal of evil, and this is obtained by means of peace: contrary to where peace is *not* to the intereſt of the *Muſſulmans*, for it is not, in that caſe, lawful, as this would be abandoning war both *apparently*, and *in effect*. It is here, however, proper to obſerve that it is not abſolutely neceſſary to reſtrict a peace to the term above recorded (namely, *ten years*,) becauſe the end for which peace is made may be ſometimes more effectually obtained by extending it to a *longer* term.

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* *Arab. Hirbee*. This, in its literal ſenſe, ſignifies an *enemy*; the term, however, extends to *all mankind* except *Muſſulmans* and *Zimmees*, whether they be actually at war with the *Muſſulmans* or not. It appears to be ſynonymous with the Latin *Hoſtis*.

and it may alſo be broken, when neceſſary, giving the infidels due notice;

If the *Imâm* make peace with the aliens for a ſingle term, (namely, *ten years*,) and afterwards perceive that it is moſt advantageous for the *Muſſulman* intereſt to break it, he may in that caſe lawfully renew the war, after giving them due notice; becauſe, upon a change of the circumſtances which rendered peace adviſeable, the breach of peace is war, and the obſervance of it a deſertion of war *, both in *appearance*, and alſo in *effect*, and war is an ordinance of God, and the forſaking of it is not becoming [to *Muſſulmans.*] It it to be obſerved that giving due notice to the enemy is in this caſe indiſpenſably requiſite, in ſuch a manner that treachery may not be induced, ſince this is forbidden. It is alſo requiſite that ſuch a delay be made in renewing the war with them as may allow intelligence of the peace being broken off to be univerſally received among them; and for this ſuch a time ſuffices as may admit of the *king* or *chief* of the enemy communicating the ſame to the different parts of their dominion, ſince, by ſuch a delay, the charge of *treachery* is avoided.

unleſs they act perfidiouſly, when they may be attacked *without* notice.

If the infidels act with perfidy in a peace †, it is in ſuch caſe lawful for the *Imâm* to attack them without any previous notice, ſince the breach of treaty in this inſtance originates with *them*, whence there is no occaſion to commence the war on the part of the *Muſſulmans* by giving them notice. It would be otherwiſe, however, if only a ſmall *party* of them were to violate the treaty, by entering the *Muſſulman* territory and there committing *robberies* upon the *Muſſulmans*, ſince this does not amount to a breach of treaty. If, moreover, this party be *in force*, ſo as to be capable of oppoſition, and openly fight with the *Muſſulmans*, this is a breach of treaty, with reſpect to *that party* only, but not with reſpect to the reſt of their nation or tribe; becauſe, as this party have violated the treaty without any permiſſion from their prince, the reſt are not anſwerable for their act; whereas, if they made their attack by permiſſion of their prince, the breach of treaty would be regarded as by the *whole*, all being virtually implicated in it.

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* (So in the original:) meaning, that although, where it advances the *Muſſulman* intereſts, *peace* is the ſame as war, as it anſwers the ſame purpoſe (namely their advantage,) yet this is not the caſe where advantage is no longer derived from it.

† That is to ſay, break the peace by any hoſtile act.

Peace may be granted in return for property.

If the *Imâm* make peace with aliens in return for property, there is no ſcruple; becauſe, ſince peace may be lawfully made *without* any ſuch gratification, it is alſo lawful *in return* for a gratification. This, however, is only where the *Muſſulmans* ſtand in *need* of the property thus to be acquired: for if they be not *in neceſſity*, making peace for property is not lawful, ſince peace is a deſertion of war, both in appearance and in effect.—It is to be obſerved that if the *Imâm* receive this property by ſending a meſſenger, and making peace, without the *Muſſulman* troops entering the enemy's territory, the object of diſburſement of it is the ſame as that of *Jizyat*, or capitation-tax; that is, it is to be expended upon the *warriors*, and not upon the *poor*. If, however, the property be taken after the *Muſſulmans* have invaded the enemy, in this caſe it is as *plunder*, one fifth going to the *Imâm*, and the remainder to be divided among the troops; as the property has in fact been taken by *force* in this inſtance.

War muſt not be undertaken againſt *apoſtates*.

It is incumbent on the *Imâm* to keep peace with apoſtates *, and not to make war upon them, in order that they may have time to conſider their ſituation, ſince it is to be hoped that they may again return to the faith.—It is therefore lawful to delay fighting with them, in a hope that they may again embrace *Iſlamiſm*; but it is not lawful to take property from them. If, however, the *Imâm* ſhould take property from them, it is not incumbent upon him to return it, as ſuch property is not in protection.

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* Meaning *tribes* which apoſtatiſe and deſert the *Muſſulman* cauſe, as occaſionally happened in the earlier times of *Mohammedaniſm*.

Muſſulmans muſt not *purchaſe* a peace, unleſs in caſes of extremity.

IF infidels haraſs the *Muſſulmans*, and offer them peace in return for property, the *Imâm* muſt not accede thereto, as this would be a degradation of the *Muſſulman* honour, and diſgrace would be attached to all the parties concerned in it;—this, therefore, is not lawful, except where deſtruction is to be apprehended, in which caſe the purchaſing a peace with property is lawful, becauſe it is a duty to repel deſtruction in every poſſible mode.

Warlike ſtores muſt not be ſold to *aliens*.

THE ſale of warlike ſtores to aliens is not permitted; neither is it allowed to ſend merchants among them for the purpoſe of ſelling their horſes and armour; becauſe the prophet has forbidden us to ſell warlike ſtores into the hands of aliens, or to carry them to them; and alſo, becauſe the aliens, by ſelling them warlike ſtores, are ſtrengthened to fight the *Muſſulmans*.—Selling them *horſes* is likewiſe unlawful, for the ſame reaſon. Selling them *iron* is alſo prohibited, as it is the material from which arms are conſtructed.—And as the ſale of theſe articles is diſallowed *before* peace, ſo is it likewiſe *after* peace has been concluded, as peace is of uncertain duration.—It is to be remarked that analogy would require that the rule with reſpect to ſelling them *proviſions* or *clothing* ſhould be the ſame as with reſpect to ſelling them *arms*: but to ſell them victuals and clothing is lawful, in conformity with what is recorded of the *prophet*, that he directed *Simmáma* to carry proviſions to the people of *Mecca* for ſale, although thoſe people were then *aliens**.

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* That is, had not yet ſubmitted, or embraced the faith.

SECTION.

granted by a *ſingle* perſon is valid.

If a free perſon grant protection to an infidel, or to a body of infidels, or to the people of a fort or city, the protection is valid, whether the perſon granting it be a *man* or a *woman*; and no perſon of the *Muſſulmans* is afterwards at liberty to moleſt them; becauſe the prophet has ſaid "*if the leaſt among the* MUSSULMANS *grant protection to* "*an infidel, and make a compact with him, it behoves the whole to ob-* "*ſerve ſuch protection and compact, and not to break it*;" and the learned agree that the word *adna*, [the leaſt,] in this ſaying, means *a ſingle perſon*;—and alſo, becauſe any ſingle *Muſſulman* is empowered to make war upon the infidels, wherefore they fear him, ſince he is competent to oppoſe them; by his granting protection, therefore, protection is eſtabliſhed as from him, ſince he is one of whom protection may be aſked; becauſe the object of fear is the object to which to look for protection; and a ſingle *Muſſulman* is the object of fear, (according to what was before aſſerted, that "*the infidels fear him*;") by his granting them protection, therefore, protection is eſtabliſhed as from him, and it then extends to all others beſides the perſon who grants it; in the ſame manner as in the caſe of ſeeing the new moon, at the commencement of *Ramzân**;—for, if a perſon teſtify to ſeeing the new-moon of *Ramzân*, ſaying "I ſee it," the faſt of *Ramzan* becomes incumbent upon him, and the obligation then extends to all others;—and ſo in the preſent caſe likewiſe, the protection becomes binding upon all others beſides the perſon who grants it,—and the obligation of it extends from him to all the reſt,—and they are not at liberty to infringe it.—Moreover, the cauſe of the validity of protection is the act of protecting; and as that is not of a *diviſible* nature, ſo the protection is not diviſible, and is therefore complete;—that is, the protection granted by one *Muſſulman* is conſidered as proceeding from the *whole*, in the ſame manner as the exerciſe of guardianſhip in marriage:—for if one of ſeveral guardians of an infant, who are all upon an equality, in point of guardianſhip, contract the infant in marriage, the marriage is valid and binding upon all the other guardians, and no one of them is at liberty to annul it: thus, in the preſent caſe, if any one *Muſſulman* grant protection to an infidel, the ſame is eſtabliſhed and binding upon all others, and no *Muſſulman* is at liberty to annul it, ſince the protection is valid,—except where it has an evil tendency, in which caſe it muſt be annulled, and intelligence of the ſame muſt be communicated to the infidels, in the ſame manner as if the *Imâm* himſelf were to grant a protection, and afterwards find it adviſeable to annul it, in which caſe he is at liberty to annul it, giving the infidels notice of the annulment, as has been already ſtated.—The *Imâm* muſt alſo reprehend any perſon who ſingly gives a protection, where the protection is of evil tendency, as he has in this inſtance preſumed to ſet his own judgment above that of the *Imâm*, and has confided in his own prudence. It is otherwiſe where the protection is *adviſeable*, as the perſon who grants it has here an excuſe, ſince if he were to delay giving the protection, the good to be derived from it might be defeated.

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* The ninth month of the *Mohammedan* year, during which a ſtrict faſt is enjoined, commencing from the firſt appearance of the new-moon.

The protection grar by a *Zim*

IF a *Zimmee* grant protection to an alien infidel, his protection is not valid, becauſe the acts of a *Zimmee* are liable to ſuſpicion, with reſpect to granting protection, on account of his infidelity; beſides, a *Zimmee* has no authority with reſpect to *Muſſulmans*.

or by a *ſulman* reſid ing among infidels,

IF a *Muſſulman* be reſiding among the infidels, either as a *captive* or a *merchant*, and grant a protection to aliens, his protection is invalid, becauſe he is in the power of the aliens, wherefore the aliens are not in fear of him, and protection is reſtricted to the object of *fear*; and alſo, becauſe, as perſons in thoſe ſituations are liable to be conſtrained to grant a protection, they may not be directed by what is adviſeable. If, moreover, the protection granted by the captive or the merchant were valid, whenever the infidels found themſelves preſſed in war, and unable to carry it on, they might influence the captive or the merchant to grant them a protection, and through means of that protection they might find relief, when the door of victory over them would be cloſed.

or by a proſelyte who has not yet retired into the *Muſſulman* [illegible] is

If a perſon who has embraced the *Muſſulman* faith in the country of the aliens, but who has not yet retired into the *Muſſulman* territories, grant protection to infidels, this protection is not valid, for the ſame reaſons as are aſſigned in the preceding caſe.

The protection granted by a *ſlave* is not valid, unleſs he be licenced to engage in war.

If a [*Muſſulman*] ſlave grant protection, it is not valid (according to *Haneefa*) except where his maſter has given him permiſſion to engage in war. *Mohammed* ſays that the protection granted by a ſlave is valid, and ſuch alſo is the opinion of *Shafeï*.—*Aboo Yooſaf* alſo agrees with him, according to one tradition.—According to another tradition, his opinion is the ſame as that of *Haneefa*. The arguments of *Mohammed* are twofold:—FIRST, *Aboo Mooſa Aſhyâree* relates that the prophet declared the protection granted by a ſlave to be a valid protection:—SECONDLY, a *ſlave* may alſo be a *believer*, and may conſequently poſſeſs a power of reſiſtance*: the protection granted by an *unlicenced* ſlave, therefore, is valid, in the ſame manner as the protection granted by a ſlave who has been permitted to engage in war;—and in the ſame manner, alſo, as a contract of fealty or ſubjection is valid; (for, if an alien were to execute a contract of fealty before a ſlave, and the ſlave agree thereto, the contract is valid †;—and ſo here likewiſe.)—The reaſon why a ſlave, *not* licenced to engage in war, is held in the ſame light as one who is *licenced*, is that the cauſe of the validity of the protection granted by the *licenced* ſlave is his being a *believer*, and conſequently capable of reſiſtance; and this circumſtance is conſtituted the cauſe, on the ground that *faith* is conditional to *piety*, and war [with infidels] is an act of piety.—This *power of reſiſtance*, moreover, is made a condition, in order that the protection may be eſtabliſhed as from its proper ſource, ſince the object of fear is the object to which to look for protection. Now as the ſlave in queſtion poſſeſſes a power of reſiſtance, he is *feared*, and protection may therefore proceed from him; and the advantage of protection (namely, the advancement of religion, and of the *Muſſulman* intereſts) is alſo obtained; for the queſtion ſuppoſes a caſe in which the intereſt of the *whole body* of *Muſſulmans* is concerned. It being demonſtrated, therefore, that the cauſes of the validity of a protection granted by a licenced ſlave are *belief*, and a conſequent *power of reſiſtance*, and theſe cauſes exiſting equally in the ſlave who is *not* licenced, it follows that his protection is equally valid:—but yet it is not lawful for him to *fight*, becauſe this would be contrary to his maſter's intereſt [*],—whereas the granting of protection being only *a ſpeech*, the intereſt of the maſter can in no reſpect be endangered by it.—The arguments of *Haneefa* on this ſubject are twofold;—FIRST, a ſlave who is not *licenced* to fight is *inhibited from* fighting, whence his protection is not valid; becauſe the infidels have no fear of him, and conſequently he cannot be the ſource of protection, (ſince the *object of fear* is the object to which to look for protection, as was already obſerved;)—and ſuch being the caſe, a protection granted by him is of no effect: contrary to a ſlave who is *licenced* to fight, ſince he is eſtabliſhed the object of fear.—SECONDLY, fighting is not lawful to the inhibited ſlave, as this is an act which affects his maſter in ſuch a mode as to create an apprehenſion of damage to him; and the ſlave's granting protection is o of the ſame nature, becauſe granting protection is one branch of military authority, ſince the deſign of *fighting* is to remove the wickedneſs of the infidels, and this end is obtained by granting protection; the ſlave's granting protection, therefore, is one of the branches of war; and in this there is an apprehenſion of injury to his maſter;—for a ſlave ſometimes makes a miſtake in granting protection, (nay, it is the rather to be apprehended that he *ſhould* make a miſtake,) becauſe, as his time is chiefly employed about his maſter, he cannot be experienced in *war*, and hence, if his protection were valid, plunder would be precluded; and this is an injury to all the *Muſſulmans*, of whom his maſter is one. The protection, therefore, granted by an inhibited ſlave is an act of military authority, in which there is an apprehenſion of injury to the maſter, and conſequently is not valid. It is otherwiſe where a ſlave licenced to fight grants a protection, becauſe this is valid, although it admit an apprehenſion of injury in reſpect to the maſter, ſince the maſter appears conſenting to his own injury. A licenced ſlave, moreover, is ſeldom guilty of a miſtake, becauſe he is accuſtomed to fighting. The caſe in queſtion is alſo different from a contract of fealty; becauſe ſuch a contract is a ſubſtitute for converſion to the faith, and therefore ſtands in the place of a *call* to the faith; and alſo, becauſe ſuch a contract is as a balance to *capitation-tax*; and alſo, becauſe conſent to ſuch a contract, when the infidels deſire it, is ordained; and the fulfilment of a divine ordinance is peculiarly advantageous: hence there is an evident diſtinction between granting protection and aſſenting to a contract of fealty.

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* In oppoſition to the ſtate of an *infidel*, who not being allowed to carry arms, is held incapable of reſiſtance.

† That is, the alien is made a *Zimmee*, or ſubject of the *Muſſulman* ſtate.

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[*] As it would endanger the life of the ſlave, who is his maſter's property.

The protection granted

IF a boy of immature underſtanding grant a protection to an infidel, his protection, like that of a lunatic, is not valid.—If the boy be of mature underſtanding, but not licenced to engage in war, then concerning his protection there is a difference of opinion, the ſame as before mentioned reſpecting the unlicenced ſlave: if, however, this boy be licenced to engage in war, his protection is valid;—and this is approved.

CHAP. IV.

Of Plunder, and the Diviſion thereof.

A conquered country may either be divided among the troops, or left in the poſſeſſion of the inhabitants under *tax* and *tribute*:

property cannot be left with them,

If the *Imâm* conquer a country by force of arms, he is at liberty to divide it among the *Muſſulmans*, (in the ſame manner as the prophet divided *Kheebir* among his followers:)—or, he may leave it in the hands of the original proprietors, exacting from them a capitation-tax, and impoſing a tribute upon their lands, in the ſame manner as *Omar* did with reſpect to the people of *Irâk*.—The *Imâm*, therefore, has either of theſe at his option, and may prefer that mode which is moſt adapted to his ſituation. Some, however, aſſert that the *former* of theſe is preferable, where the troops are neceſſitous,—and that the *latter* is preferable, where they are *not* neceſſitous, in order that the tax and tribute may be reſerved as a fund to anſwer contingencies.—Such is the law with reſpect to *immoveable* property and *lands*:—but with reſpect to *moveable* property, it is unlawful to leave that with the infidels, as no mention is made of it in the ſacred writings.—*Shafeï* maintains that leaving *immoveable* property with them is alſo unlawful, ſince this would be deſtructive to the right of the troops;—the relinquiſhment of it, therefore, is illegal without an adequate return; and tribute is not an adequate return, as it is, comparatively, of trifling value. It is otherwiſe with reſpect to the *perſons* of the infidels, which the *Imâm* may lawfully releaſe in conſideration of a capitation-tax, becauſe, as the *Imâm* may lawfully deſtroy the right of the troops in their perſons, by putting them all to death, it follows that his deſtroying this right *for a return*, is lawful *a fortiori*, although the return be of a *trifling* nature.—This reaſoning, however, is refuted by what is recorded of *Omar*, as above.—Moreover, leaving the conquered country in the hands of the inhabitants, in the manner before mentioned, is advantageous to the *Muſſulmans*, and adviſeable in reſpect to them, becauſe in this caſe the inhabitants are merely the cultivators of the ſoil on behalf of the *Muſſulmans*, as performing all the labour, in the various modes of tillage, on their account, without their being ſubjected to any of the trouble or expence attending it.—With reſpect to what *Shafeï* alleges, that "tribute "is, comparatively, of trifling value," we reply, that although tribute be *a trifle* on the inſtant, yet with regard to *property* it is conſiderable, on account of its being *permanent*.

further than may be neceſſary to enable them to till their lands.

If the *Imâm* relinquiſh to the inhabitants of the territory their lands and perſons, it is incumbent on him to reſign to them ſuch a portion of their moveable property as may enable them to perform their buſineſs, and cultivate their lands, leſt abomination be induced; ſince if he were not to leave them thus much property, it would be abominable.

Captives may either be

The *Imâm*, with reſpect to captives, has it in his choice to ſlay them, becauſe the prophet put captives to death,—and alſo, becauſe ſlaying them terminates wickedneſs:—or, if he chuſe, he may make them ſlaves, becauſe by enſlaving them the evil of them is remedied, at the ſame time that the *Muſſulmans* reap an advantage:—or, if he pleaſe, he may releaſe them ſo as to make them freemen and *Zimmees*, according to what is recorded of *Omar*:—but it is not lawful ſo to releaſe the idolaters of *Arabia*, or apoſtates, for reaſons which ſhall be hereafter explained.

but they muſt not be ſuffered to return to their own country;

It is not lawful for the *Imâm* to return the captives to their own country, as this would be ſtrengthening the infidels againſt the *Muſſulmans*.

and, if they embrace the faith, they

If captives become *Muſſulmans*, let not the *Imâm* put them to death, becauſe the evil of them is here remedied without ſlaying them:

but yet he may lawfully make them ſlaves, after their converſion, becauſe the reaſon for making them ſlaves, (namely, their being ſecured within the *Muſſulman* territory,) had exiſtence previous to their embracing the faith. It is otherwiſe where infidels become *Muſſulmans* before their capture, becauſe then the reaſon for making them ſlaves did not exiſt previous to their converſion.

muſt not be put to death.

It is not lawful to releaſe infidel captives in exchange for the releaſe of *Muſſulman* captives from the infidels.—According to the two diſciples this is lawful, (and ſuch, alſo, is the opinion of *Shafeï*,) becauſe this produces the emancipation of *Muſſulmans*, which is preferable to ſlaying the infidels, or making them ſlaves.—The argument of *Haneefa* is that ſuch an exchange is an aſſiſtance to the infidels; becauſe thoſe captives will again return to fight the *Muſſulmans*, which is an evil; and the prevention of this evil is preferable to effecting the releaſe of the *Muſſulmans*, ſince, as they remain in the hands of the infidels, the injury only affects them, and does not extend to the other *Muſſulmans*, whereas the injury attending the releaſe of infidel captives extends to the whole body of *Muſſulmans*.—An exchange for property (that is, releaſing infidel priſoners in return for property) is alſo unlawful, as this is aſſiſting the infidels, as was before obſerved; and the ſame is mentioned in the *Mazhab Maſhhoor*.—In the *Seyir Kabeer* it is aſſerted that an exchange of priſoners for *property* may be made, where the *Muſſulmans* are neceſſitous, becauſe the prophet releaſed the captives taken at *Biddir* for a ranſom.

Exchange of captives is unlawful.

If a captive become a *Muſſulman* in the hands of the *Muſſulmans*, it is not lawful to releaſe and ſend him back to the infidels in return for their releaſing a *Muſſulman* who is a captive in their hands, becauſe no advantage can reſult from the tranſaction. If, however, the converted captive conſent to it, and there be no apprehenſion of his apoſtatizing, in this caſe the releaſing of him in exchange for a *Muſſulman* captive is a matter of diſcretion.

A converted captive muſt not be ſuffered to return to his own country.

Captives muſt not be releaſed *gra-*

It is not lawful to confer a favour upon captives by releaſing them gratuitouſly,—that is, without receiving any thing in return, or their becoming *Zimmees*, or being made ſlaves. *Shafeï* ſays that ſhewing favour to captives, in this way is lawful, becauſe the prophet ſhewed favour, in this way, to ſome of the captives taken at the battle of *Biddir*. The arguments of our doctors upon this point are twofold: FIRST, GOD ſays in the *Koran* "SLAY IDOLATERS, "WHEREVER YE FIND THEM;"—SECONDLY, the right of enſlaving them is eſtabliſhed by their being conquered and captured, and hence it is not lawful to annul that right without receiving ſome advantage in return, in the ſame manner as holds with reſpect to all plunder; and with reſpect to what *Shafeï* relates, that "the prophet ſhewed "favour, in this way, to ſome of the captives taken at the battle of "*Biddir*," it is abrogating by the text of the *Koran* already quoted.

All cattle and baggage which cannot be carried

be deſtroyed.

Whenever the *Imâm* is deſirous of returning from a hoſtile country into the *Muſſulman* territory, if he ſhould happen to have along with him baggage-cattle, ſuch as oxen, camels, and ſo forth, and be not able to convey them into the *Muſſulman* territory, it behoves him to ſlay and burn them; and he muſt not hamſtring them, or turn them looſe. *Shafeï* ſays that he ſhould leave them, becauſe the prophet forbids us to ſlay animals for any other purpoſe than to eat them. Our doctors argue that the ſlaying of animals is lawful for any approved end; and what end can be more approved than breaking the ſtrength of the infidels who are enemies? After ſlaying them they muſt be burnt, in order that the infidels may not derive any advantage from them, whence this anſwers the ſame purpoſe as deſtroying buildings or dwelling places *: contrary to burning *before* ſlaying, as the prophet has forbidden this; and contrary, alſo, to *ham-ſtringing*, as this is *disfiguring*, and that alſo is forbidden †. In the ſame manner, the *Imâam* muſt burn all ſuch military ſtores as are capable of being burnt; and what cannot be deſtroyed in this way muſt be buried in ſome place which the infidels are ignorant of, in order that they may not make advantage of it.

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* Probably meaning the buildings, *&c.* which the *Muſſulmans*, during their ſtay in the hoſtile country, may have conſtructed for their own accommodation.

† Chap. II. p. 148.

The plunder territory.

The *Imâm* muſt not divide the plunder in the country of the enemy, but muſt make the diſtribution of it in the *Muſſulman* territory. *Shafeï* holds that it may be divided in the country of the enemy. This diverſity of opinion is founded in a difference of tenets; for with our doctors the plunder is not the property of the troops, until it be brought into the *Muſſulman* territory,—whereas, with *Shafeï* it is the property of the troops before it be brought into the *Muſſulman* territory. From this difference in principle proceed a number of caſes concerning which they differ, as related at large, by the author, in the *Kafäyat-al-Moontihee*. The argument of *Shafeï* is that the cauſe of right of property in plunder is *conqueſt*, where that conqueſt extends over property of allowable uſe, in the ſame manner as conqueſt is the cauſe of right of property with reſpect to game: now *conqueſt* means nothing more than *ſubjection* and *ſeizin*; and thoſe are fully eſtabliſhed with reſpect to the plunder in queſtion. The arguments of our doctors upon this point are twofold: FIRST, the prophet has forbidden the *ſale* of plunder in the country of the enemy; and as a *diſtribution* of property is in effect a *ſale*, a prohibition in reſpect to the *ſale* extends to the *diſtribution* likewiſe:—SECONDLY, in the caſe in queſtion conqueſt is not eſtabliſhed; becauſe *conqueſt* ſignifies *ſubjection* and *ſeizin*, of ſuch a nature that the ſeizer is capable of protecting the plunder, and alſo of carrying it from place to place; but in the caſe in queſtion, the captors of the plunder may poſſibly be incapable of carrying it off into the *Muſſulman* territory, as the infidels may be able to reſcue it from the hands of the *Muſſulmans*, ſince the property is ſtill in their country.—Some allege that the radical ground of difference between *Haneefa* and *Shafeï* turns upon this queſtion.—Do the *effects* of right of property (ſuch as the lawfulneſs of *coition*, *ſale*, and ſo forth*,) take place upon the diviſion of the plunder in the enemy's country, where the *Imâm* divides it at once without further trouble,—or do they not?—According to *Shafeï*, the effects aforeſaid take place immediately upon the diviſion; but in the opinion of our doctors they do not take place: and hence it follows that with *Shafeï* the plunder becomes the property of the troops before its being conveyed into the *Muſſulman* territory, ſince the effects of a *right* of property cannot exiſt without the exiſtence of the property itſelf;—but with our doctors the plunder does not become the property of the troops until it be brought into the *Muſſulman* territory, ſince if it were their property, the effects of a right of property would take place upon the diſtribution of it in the enemy's country.

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* With reſpect to the women or property taken.

liary have an equal right in the plunder;

plunder, the warrior and the auxiliary (being preſent with the army,) have an equal claim; becauſe the foundation of a right to plunder, according to our doctors, is the "*going paſt the boundary of the Muſſulman territory with an intention to fight;*" whereas, in the opinion of *Shafeï*, *actual preſence*, (that is, *being preſent at the place where war is carried on*,) is the cauſe of the right; and the warrior and his aſſiſtant are equal with reſpect to the cauſe of the right; and ſuch being the caſe, they are equal in ſharing the plunder. In the ſame manner, a perſon who has retired from the ſervice by the admiſſion of an excuſe, (ſuch as *ſickneſs*, for inſtance,) is on an equal footing with him who actually *fights*, becauſe he alſo is, in point of *right*, upon an equal footing with him who is actually engaged.

and alſo the ſick;

and ſo, likewiſe, any reinforcements which join the army before the plunder is carried off.

If reinforcements join the army in the enemy's country, before the plunder is conveyed into the *Muſſulman* territory, they are entitled to a full ſhare of the booty. *Shafeï* ſays that if they join the army when the fighting is finiſhed, they are not entitled to ſhare with the warriors, becauſe, in his opinion, the plunder becomes the property of the troops on the inſtant of its ſeizure, wherefore no perſon is afterwards entitled to ſhare with them in it.—According to our doctors, on the contrary, the plunder is rendered the property of the *Muſſulmans*, only by the circumſtance of conveying it into the *Muſſulman* territory, or the diſtribution of it in the enemy's country, or the ſale of it there, (for by any of theſe the right of the troops is eſtabliſhed;) here, therefore, no other perſon is entitled to ſhare with the troops, whereas, any perſon who joined them previous to the diviſion, &c. would have a claim to ſhare with them.

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of the army have no right in the plunder, unleſs they actually engage in fight with the infidels. According to one opinion of *Shafeï*, they are entitled to a ſhare in the plunder, in conformity with a ſaying of the prophet, "*The plunder belongs to thoſe* "*who are actually preſent*;"—and alſo, becauſe the followers are likewiſe engaged *in effect*, as they increaſe the general ſtrength of the army. The argument of our doctors is that thoſe do not go into the enemy's country, or paſs the *Muſſulman* borders, with any *deſign of fighting*; and *this* is the *apparent* cauſe of a right in the plunder; and as the *apparent* cauſe does not exiſt, regard is had to the *actual* cauſe, namely, *engaging in fight*. If, therefore, they *fight*, their right is eſtabliſhed in proportion to their ſtations;—that is, if they fight on *horſeback*, they are entitled to a horſeman's ſhare, or if on *foot*, to a foot-ſoldier's ſhare. With reſpect to the tradition cited by *Shafeï*, it means that "the plunder belongs to thoſe who are "actually preſent *with an intention of fighting*."

In defect of
carriages th

If the *Imâm* be not poſſeſſed of carriages ſufficient for the conveyance of the plunder into the *Muſſulman* territory, he muſt diſtribute it among the troops, committing to each perſon his reſpective ſhare, in the manner of a depoſit, until they bring it into the *Muſſulman* territory, when he muſt take it back from them, and again make a regular diſtribution of it. The compiler of the *Hedâya* remarks that this is what is mentioned by *Kadooree*, in his abridgment of his own work: and he does not make the *conſent* of the troops a condition. The ſame is alſo mentioned in the *Seyir Kabeer*. In ſhort, if there be among the plunder any carriage cattle, ſuch as *camels*, *horſes*, *aſſes*, or *mules*, the *Imâm* muſt load the plunder upon them, becauſe here the plunder and the carriage are both the property of the troops; and the rule is the ſame, if there happen to be any ſpare carriage attached to the public treaſury, ſince the effects in the public treaſury are the property of all the *Muſſulmans*: but if there be any ſpare carriage attached to the troops, or to any part of them, yet the *Imâam* muſt not forcibly ſeize them for this purpoſe, becauſe this is *hire*, and compulſion in *hire* is not lawful; in the ſame manner, as when a perſon's animal periſhes, upon a retreat, and his ſervant happens to have ſome ſpare carriage, in which caſe he cannot compel his ſervant to hire him ſuch ſpare carriage.—This is according to the *Seyir Sagheer*. According to the *Seyir Kabeer*, the *Imâm* is at liberty to uſe compulſion, for the purpoſe of having the plunder carried, becauſe this is preventing a *general* and *pnblic* injury by the commiſſion of a *private* injury.

The plunder muſt not be *ſold* in the country.

It is not lawful to *ſell* plunder whilſt in the enemy's country, or before it be regularly diſtributed, becauſe, until then, it is not *property*. According to *Shafeï* the ſale is lawful, becauſe he holds that the plunder becomes property upon the inſtant of its capture.

Death

in the plunder

If a warrior die in the enemy's country, he has no right in the plunder; but if he die after the plunder is brought into the *Muſſulman* territory, in this caſe his ſhare goes to his heirs. The reaſon of this is that actual right of property is eſſential to inheritance, and the warrior has not any right in the plunder before it be brought into the *Muſſulman* territory, whereas *after* it is brought within he has a right in it. *Shafeï*, on the contrary, maintains that if the warrior die *after the defeat* of the infidels, his ſhare goes to his heirs, becauſe he holds that the plunder becomes the property of the troops upon the infidels being defeated.

The troops may uſe all *eatable* articles, *&c.*

THERE is no objection to the troops feeding their cattle with plunder * whilſt in the enemy's country, nor to themſelves eating ſuch plunder as is fit for *food*, ſuch as *bread*, *oil*, and ſo forth. The compiler of the *Hedáya* obſerves that *Kâdooree*, in his abridgment, mentions this *abſolutely*, and does not reſtrict it to the condition of *neceſſity*. There are, however, two reports relating to this ſubject: according to *one*, the liberty is reſtricted to the condition of *neceſſity*; and according to the other it is *un*-reſtricted. The reaſon upon which the *firſt* report proceeds is that the forage or victuals in queſtion are a *partnerſhip property*, and hence theſe acts are not permitted with reſpect to them except through neceſſity, agreeably to the rule which reſpects *animals*, or *cloth*: and the arguments upon which the *ſecond* report proceeds is, FIRST, that the prophet ſaid, at *Kheeber*, "*Eat the* FOOD *found in the plunder*, *and feed your* "*cattle with the* FORAGE, *and do not carry it along with you*, *or* "*hoard it up*:"—SECONDLY, the point of law reſts upon the *argument* of neceſſity, and not upon neceſſity itſelf: now the *argument* of neceſſity is certified, namely, the circumſtance of the troops being in an enemy's country; becauſe a ſoldier does not carry along with him into the enemy's country either ſubſiſtence for himſelf or forage for his cattle ſufficient to ſerve during his reſidence there; and in time of war caravans cannot ſupply troops with ſubſiſtence. The food and forage, therefore, remain allowable to uſe upon the ground of the *argument* of neceſſity. It is otherwiſe in regard to *weapons* or *armour*, as it is not lawful for the troops to take theſe from the *plunder*, becauſe they carry arms along with them, and hence the *argument* of neceſſity, in reſpect to arms, is not eſtabliſhed :- but yet regard is had to ceſſity in reſpect to the uſe of them; and hence, if any neceſſity occur for the uſe of ſuch arms as may be among the plunder, it is lawful for the warriors to make uſe of them, afterwards returning them into the plunder: and *cattle* ſtand in the ſame predicament with *arms* in this reſpect.

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* Such as *grain*, &c.

taken as plunder may be converted to uſe.

There is no objection to the warriors uſing *wood* [ſeized as *plunder*] in the enemy's country. It is alſo lawful for them to make uſe of *oil*, ſuch as oil of olives, and alſo greaſe, for ſoftening the hoofs of their cattle; becauſe there is ſometimes a neceſſity for theſe articles.

Victuals, *allowed* *uſed*, c be *ſold*.

It is not lawful for the warriors to *ſell victuals*, *forage*, and ſo forth; becauſe the legality of *ſale* depends upon the article ſold being *property*; and theſe are not their property, (according to what has been already advanced,) the eating of the victuals or uſing the other articles being lawful only by *allowance*, in the ſame manner as when a perſon allows another the uſe of his victuals, in which caſe the the other may *eat* them, but cannot *ſell* them. It is to be obſerved that the prohibition of *ſale* now mentioned implies that it is not at all lawful for the troops to ſell theſe articles in return for either *gold*, *ſilver*, or *effects*. If, however, they ſhould ſell them for gold, ſilver, or effects, it is incumbent on them to lodge the price along with the reſt of the plunder, becauſe this price is a thing held in partnerſhip by the whole army. In the ſame manner, it is not lawful to diſpoſe of thoſe articles in return for proviſions or cloathing, without neceſſity; but if a neceſſity for proviſion or cloathing occur, the articles in queſtion may lawfully be diſpoſed of in return for theſe neceſſaries.

cannot be turned , but in

It would be abominable in the troops, without neceſſity, to make uſe of *cloth* or other ſimilar articles of plunder, before the regular diſtribution,

caſes of
ceſſity.

tribution, becauſe theſe articles are, until then, held in partnerſhip. If, however, the troops ſtand in need of cloth, cattle, or other articles, in this caſe the *Imâm* muſt diſtribute theſe among them, although in the enemy's country, becauſe as a thing *prohibited by the law* is ſometimes allowed in conſideration of neceſſity, it follows that a thing which is merely abominable *, is allowed in a ſimilar caſe, *a fortiori*. The foundation of this is that the diviſion of the articles in queſtion is abominable only from the apprehenſion of ſuccours joining the army in the enemy's country; for theſe are equal partners with the reſt of the troops; and if the plunder were divided before their arrival, and they then join the army, it would be impoſſible to obtain reſtitution, for the purpoſe of paying the auxiliaries their ſhares, (whence it is that the diviſion of the plunder is delayed until it be brought into the *Muſſulman* territory and this apprehenſion removed:)—but when the troops ſtand in need of the cloth, cattle, or other articles, in this caſe they may be diſtributed among them in the enemy's country, becauſe the right of the auxiliaries is merely *probable*, whereas the neceſſity of the troops is *certain*, and therefore of prior conſideration. Nothing is here ſaid concerning the rule with reſpect to *arms*, and *armour*: there is, however, no manner of difference between theſe and *cloth* or other articles, for if any of the warriors ſtand in need of them, the uſe is allowed to him, and if all the troops ſtand in need of weapons and accoutrements, they muſt be diſtributed among them. It is otherwiſe, however, in the caſe of a want of male or female ſlaves, for of the captives no diſtribution can be made on any plea of *neceſſity*, becauſe they come under the deſcription of *indiviſible plunder* †.

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* *Abominable*, in the language of the *Muſſulman* law, means a thing not abſolutely *illegal*, but *reprobated* or *diſapproved*.

† The only method of dividing plunder which conſiſts of *captives* is by ſelling them at the end of the expedition, and throwing the price for which they are ſold into the general ſtock of plunder. Plunder conſiſting of *cattle* is alſo divided in the ſame way, but as they are, comparatively, of trifling moment, this is no objection to the uſe of them.

An alien, becoming a convert, preſerves his liberty and property, and his infant children;

If a hoſtile infidel become a *Muſſulman* in the hoſtile country, his perſon is his own, (that is, he cannot be made a ſlave,) becauſe a perſon who is firſt a *Muſſulman* cannot then be ſubjected to bondage, as his *Iſlâm* forbids this.—In the ſame manner, his infant children belong to himſelf, becauſe they alſo are held as *Muſſulmans*, in dependance of their father.—Such of his *property*, alſo, as is in his hands is his own; becauſe the prophet has ſaid "*whoever becomes a* "MUSSULMAN, *and is poſſeſſed of property, in his own hands, ſuch pro*-"*perty belongs to him*;"—and alſo, becauſe his hands have firſt laid hold of that property, in the manner of the hands of a conqueror.—In the ſame manner ſuch of his property as is a depoſit in the hands of a truſtee, whether a *Muſſulman* or a *Zimmee*, is alſo reſerved to him, becauſe the ſeizin of the *truſtee* is the ſame as that of the *proprietor*.

but his lands are public property;

If the *Imâm* ſubdue a country by force of arms, the lands which were the property of one who has embraced the faith become the property of the public treaſury *.—*Shafeï* maintains that his lands alſo continue to belong to him, becauſe they are *in his hands*, and hence are ſubject to the ſame rule as moveable property. Our doctors, on the other hand, allege that his lands are in the hands of the *ſtate*, or of the ſovereign of that territory, (as they are a conſtituent part of the country,) wherefore they are not, *a certiori*, in *his* hands.—Some obſerve that this is according to the opinion of *Haneefa*, and a recent opinion of *Aboo Yooſaf*: for, according to the opinion of *Mohammed*, and a *former* opinion of *Aboo Yooſaf*, the lands of this perſon are in the ſame predicament with his other property.—This difference of opinion originates in a difference of doctrine reſpecting the tenure of land; for *Haneefa* and *Aboo Yooſaf* hold that ſeizin is not eſtabliſhed, *a certiori* in lands; whereas *Mohammed* holds that it is eſtabliſhed.—The wife alſo of this perſon is public property, as ſhe is an alien, and is not a dependant of her huſband with reſpect to *Iſlam:* and her fœtus is alſo under the ſame predicament.—*Shafeï* maintains that her fœtus is not public property, ſince it is a *Muſſulman* in dependance of the father, in the ſame manner as infant children.—Our doctors, on the other hand, allege that the fœtus is a portion of the woman, and is therefore a ſlave in conſequence of her becoming a ſlave, ſince ſhe is a ſlave in all her parts: and with reſpect to what is advanced by *Shafeï*, that "the fœtus is a *Muſſulman*, in dependance of the father, in the "ſame manner as infant children,"—they obſerve that although the fœtus be a *Muſſulman*, yet a *Muſſulman* may be a ſubject of bondage in dependance of another perſon: contrary to the caſe of infant children, as the ſaid children are free, becauſe, after being born, they are no longer a portion of the mother.—The adult children of this perſon are alſo public property *, becauſe they are infidel aliens, and are not dependant of their father in *Iſlâm:*—and ſo likewiſe his ſlave who fights againſt the *Muſſulmans*, becauſe the ſlave, upon throwing off his ſubjection to his maſter †, goes out of the poſſeſſion of his maſter, and becomes a dependant on the people of that territory.—In the ſame manner, ſuch of his property as is in the hands of an infidel alien, whether in the way of *uſurpation* or *depoſit*, is the property of the ſtate, becauſe the ſeizin of an infidel alien is not of an inviolable nature:—and ſuch of his property as is in the hands of a *Muſſulman* or a *Zimmee*, in the way of *uſurpation*, is in the ſame predicament.—This laſt is the opinion of *Haneefa*.—The two diſciples maintain a contrary opinion, for they argue that the property is a dependant of the perſon, and as the perſon of the proprietor is under protection in conſequence of his converſion to the faith, it follows that his property is alſo under protection, as a dependant of his perſon.—The argument of *Haneefa*

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* Arab. *fee*, meaning that proportion of the plunder which is the right of the ſtate — The tranſlator avoids introducing it here, from its ſimilarity to the feudal term *fee*, which bears quite a different ſenſe; and has therefore rendered it, throughout, *public property*, or *the property of the ſtate*.

and ſo alſo his

and his *adult* children, and

and his property in the hands of in-

mans, by uſurpation.

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* That is to ſay, are made ſlaves, and as ſuch united to that part of the plunder which is the property of the ſtate.

† By uniting in fight againſt the believers, of whom his maſter is now one.

is that the property in queſtion is of a neutral nature *, and therefore liable to be appropriated by right of conqueſt:—and as to what the two diſciples urge, we reply that it is not admitted that the perſon of the proprietor is under protection "*in conſequence of his converſion to the* "*faith*," for the moleſting of him is originally unlawful, (as appears by his being required to embrace the faith, ſince if he were *originally* deſerving of death, he would not be required ſo to do,) and is rendered allowable only by a *ſupervenient* circumſtance, namely his wickedneſs, [that is, his infidelity;] but by his converſion to the faith his wickedneſs is removed: contrary to *property*, as that is originally created for the purpoſe of being *uſed*, and is therefore a proper ſubject of appropriation. Moreover, the property in queſtion is not in his hands either *actually* or *virtually*: its not being *actually* ſo is evident; and it is not *virtually* ſo, becauſe the ſeizin of the *uſurper* does not ſtand as the ſeizin of the *proprietor*, and hence the protection of the property is not eſtabliſhed.—Thus it is demonſtrated that his *property* is from his *perſon*.

or *proviſions* taken muſt not be uſed after the evacuation of the enemy's country: and ſuch of it turned into the plunder ſtores:

Upon the *Muſſulman* army evacuating the enemy's country, it becomes unlawful for the troops to feed their cattle with forage belonging to the plunder;—and, in the ſame manner, it is unlawful for them to eat of ſuch victuals as make a part of the plunder;—becauſe the troops ſubſiſting themſelves, or feeding their cattle, out of the plunder, is allowed only on the ground of *neceſſity*, which is then removed; and alſo, becauſe the right of each individual [in the plunder] is then confirmed, whence it is that the ſhare of one who afterwards dies is hereditable, whereas, before the evacuation of the enemy's country, no perſon's ſhare is hereditable.—If, alſo, after arriving in the *Muſſulman* territory, there ſhould chance to remain with any of the troops a part of the plundered food or forage, it muſt be returned into the ſtores of ſpoil, provided the general diſtribution of that ſhould not yet have taken place.—*Shafeï* in one place agrees with our doctors.—In another place he aſſerts that thoſe articles are not to be returned into the plunder ſtores; upon the ſame principle that a warrior, if he *ſteal* the property of an alien, is not required to deliver it into the plunder ſtores, becauſe this is property of a neutral nature, upon which he has laid his hands firſt.—Our doctors, on the other hand, allege that the appropriation of the food or forage to the perſon in whoſe hands they remain was only *from neceſſity*; but upon arriving in the *Muſſulman* territory this neceſſity is removed: contrary to the caſe of a warrior ſtealing the property of an alien, becauſe, as he obtains an excluſive right in that property *before* his arrival in the *Muſſulman* territory, it follows that he has the ſame excluſive right in it *after* his arrival there.—If, moreover, the forage or proviſion in queſtion remain with any one *after* the general diviſion of the plunder, in this caſe, provided the poſſeſſor be rich, he muſt beſtow it in alms; but if he be *poor*, he may convert it to his own uſe, becauſe the food or forage then ſtand in the ſame predicament with a *Lookta*, or trove property, ſince the reſtoration of it to the troops is become impoſſible.—If, alſo, any perſon ſhould *uſe* the victuals or forage after arriving in the *Muſſulman* territory, and before the plunder is diſtributed, it is incumbent upon him to pay the value thereof into the plunder; or, where the plunder has been diſtributed, he muſt, if *wealthy*, beſtow the value in alms; but if *poor*, nothing is due from him, ſince the value of a thing is a ſubſtitute for the thing itſelf, and is therefore ſubject to the ſame rule.

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* Arab. *Mobah:* that is, not under any effectual protection.

or, if *uſed*, the value muſt be accounted for.

SECTION.

SECTION.

Of the Manner of the DIVISION *of* PLUNDER.

One fifth goes to the ſtate, and four fifths to the troops.

IN making a diviſion of the plunder, the *Imâm* muſt ſet apart *one* [illegible] of the whole, and diſtribute the remaining *four fifths* among the troops, as it was thus the prophet divided it.

The ſhare of a horſeman is twice that of a foot ſoldier.

THE ſhare of a horſeman is double the ſhare of a foot ſoldier, according to *Haneefa.*—The two diſciples ſay that the ſhare of a horſeman is *thrice* that of a foot ſoldier, (and ſuch alſo is the opinion of *Shafeï,*) becauſe it is recorded by *Abdoola Ibn Omar* that the prophet gave to the horſeman *three* ſhares, and to the foot ſoldier *one* ſhare, for this reaſon, that the right to plunder is in proportion to the *duty* and the *fatigue*,—and the horſeman performs three ſeveral duties;—firſt, *Kirr*, or attack,—ſecondly, *Firr*, or retreat, (made by way of ſtratagem, or with a view to return to the charge with increaſed violence,)—and thirdly, *Iſbât*, or ſtanding firm in one place,—whereas the *foot ſoldier* performs only *one* duty, namely *Iſbât* or ſtanding in his poſt. The argument of *Haneefa* is that *Abdoola Ibn Abbas* relates that the prophet gave to the horſeman *two* ſhares, and to the foot ſoldier *one* ſhare; now this is irreconcileable with what is related by *Abdoola Ibn Omar*, whence a contradiction appears between two acts of the prophet; and ſuch being the caſe, the ſaying of the prophet is adhered to, "*to the horſeman belongs* TWO *ſhares, and to the foot ſoldier* "ONE *ſhare.*"—*Ibn Omar* relates, moreover, that the prophet gave three ſhares to the horſeman, and one to the foot ſoldier; and alſo, in another place, that he gave to the horſeman *two* ſhares, and to the foot ſoldier *one* ſhare; and as theſe two accounts are contradictory, a

preference is given to the relation of another perſon, namely, *Ibn Abbas*.—Beſides, *attacking* and *retreating* are of the ſame nature, whence it appears that the horſeman performs no more than *two* duties, and the foot ſoldier *one* duty; wherefore the ſhare of the horſeman is only *twice* as much as that of the foot ſoldier:—moreover, a regard to the heavier duty of the horſeman is impracticable, as it is a matter which cannot readily be aſcertained: hence the rule, with reſpect to the ſhares, muſt turn upon the apparent ground of claim to plunder; and on the part of the horſeman *two* grounds of claim appear, namely, his *perſon*, and his *horſe*, whereas, on that of the foot ſoldier *one* ground only appears, namely, his *perſon*;—the horſeman, therefore, is entitled to twice the ſhare of the foot ſoldier.—It is proper to obſerve, however, that nothing more is to be allowed to a horſeman than the ſhare on account of *one* horſe, although he have along with him two horſes, or more. *Aboo Yooſaf* ſays that if he have *two* horſes, or more, the ſhares on account of *two* horſes are to be allotted him, becauſe it is related, that the prophet once allowed a horſeman ſhares for two horſes,—and alſo, becauſe one horſe is liable to be ſick or turn lame, whence there is a neceſſity for another horſe.—The arguments of *Haneefa* and *Mohammed* are twofold.—FIRST, *Birrayeen Awoos* carried with him to the wars two horſes, and the prophet allowed him only a ſingle horſeman's ſhare:—SECONDLY, one man cannot fight upon two horſes at one time, wherefore two horſes cannot be conſidered as affording two claims, whence it is that where a perſon has *three* horſes, yet he is not entitled to a ſhare for three.—With reſpect to what is related by *Aboo Yooſaf*, it is to be thus explained, that the prophet beſtowed the ſhare for two horſes upon the horſeman in the way of a *gratuity*,—in the ſame manner as he once allowed *Salima Bin Akooa* two ſhares, when he ſerved as a foot ſoldier.—It is alſo proper to remark that a *Birzoon* *, an *Arab*†, an *Hoojeen*‡, and a
are all equally capable of giving a claim to plunder; be-

A horſeman is not entitled to any thing additional from having more than *one* horſe.

Horſes of all deſcriptions equally en-

to

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[*] A heavy *draft horſe*. † A *firſt blood*. ‡ A *packhorſe*. § An

cauſe

men.

cauſe the expreſſion in the *Koran*, Irhâb, (that is, *ſtriking terror*,) has a reference to the preceding word kheel, [a *troop*, or *ſquadron*,] and the word *Kheel* comprehends all thoſe kinds without diſtinction;—and alſo, becauſe although an *Arab* be apparently of the ſtronger make, yet a *Perſian* horſe is the more docile and managable; regard is, therefore, had to the advantages of each reſpectively, and hence they are both upon a footing.—The *Birzoon* is a horſe of the *Perſian* breed, and the *Arab* is bred in *Arabia*; the *Hoojeen*, on the other hand, is a *Moojânis*, or *half*-breed, whoſe dam is an *Arab* and his ſire a *Perſian*; and the *Makarrif* is alſo an half-breed, whoſe ſire is an *Arab*, and his dam a *Perſian*.

The horſe being de-ſtroyed does

If a perſon enter the enemy's country as a *horſeman*, and his horſe be afterwards deſtroyed, he is ſtill entitled to a horſeman's ſhare of plunder; but if a perſon enter the enemy's country on *foot*, and then purchaſe a horſe, he is entitled to a *foot* ſoldier's ſhare only. This is the *Záhir-Rawáyet*.—*Shafeï* maintains the *reverſe* of what is here advanced; and *Ibn al Mobârick* records, from *Haneefa*, that, under the *ſecond* circumſtance, the perſon is entitled to a *horſeman*'s ſhare.—In ſhort, with our doctors regard is had to the ſtation in which a perſon paſſes the *Muſſulman* boundary, whereas with *Shafeï* regard is had to the ſtation the perſon holds at the end of the ſervice. The argument of *Shafeï* is that it is the act of *making war* which is the cauſe of a right in the plunder, and hence regard is paid to the ſtation in which a perſon is at the *time of fighting*, the paſſing of the *Muſſulman* boundary being only an *introduction* to the cauſe, in the ſame manner as going out of a houſe:—and if (as the *Haneefites* maintain) it were impoſſible to aſcertain the actual *fighting*, it would follow that the mere *actual preſence* would be a cauſe of right in the plunder, ſince actual preſence is eaſily aſcertainable.—The arguments of our doctors upon this head are twofold.—first, *going forth* is the commencement of the war, becauſe it impreſſes terror upon the infidels; and the *continuance* conſtitutes the *war* itſelf:—but regard is not paid to the *continuance*:—SECONDLY, it is difficult to obtain any certain information reſpecting the actual *fighting*;—and ſo alſo, concerning the actual *preſence*, becauſe that has regard to the time when the two adverſe armies are drawn up in battle array againſt each other, at which time it is not eaſy to aſcertain who actually engages in fight, or who does not,—or who is preſent, or who is not;—the act, therefore, of *paſſing the boundary* is made the ſubſtitute for *fighting*, or *preſence*, becauſe the act of paſſing the boundary extends, with regard to *appearance*, either to *war*, or to *preſence*, where ſuch act was performed with a deſign of fighting.—Regard, therefore, is paid to the ſtation a perſon fills (whether that of a *horſeman* or of a *foot ſoldier*) at the time of paſſing the *Muſſulman* boundary.

If a perſon enter the enemy's country as a *horſeman*, and afterwards fight *on foot*, on account of wanting room, he is entitled to a horſeman's ſhare, according to all our doctors.—If, alſo, he enter the enemy's country as a *horſeman*, and afterwards ſell his horſe, or give him away, or hire or pledge him, he is entitled to a horſeman's ſhare, (according to what *Hooſn* reports from *Haneefa*,) regard being had to the ſtation in which he went forth.—According to the *Zâhir Rawâyet* he is in this caſe entitled only to ſhare as a *foot* ſoldier, becauſe his diſpoſing of his horſe in any of the ways here mentioned denotes that he did not go forth with a deſign to fight as a horſeman.—If a perſon ſell his horſe when the ſervice is at an end, his right, which is a *horſeman*'s ſhare, does not drop.—Some hold the rule to be the ſame, if he ſell his horſe during the ſervice; but the more approved doctrine is that he is not in this caſe entitled to a horſeman's ſhare, becauſe the ſale here denotes that his deſign was traffic, but that he waited until the ſervice began, with a view to enhance the price of his horſe.

A foot is yet entitled to ſhare as a horſeman;

and may ſell his horſe at the end of the ſervice, without injury to his claim.

man, children, or *Zimmees* have no ſhare, but are to be paid ſomething.

There is no ſhare of the plunder allotted to *ſlaves, women, children*, or *Zimmees:* but yet it is incumbent on the *Imâm* to beſtow ſomething upon them, to ſuch amount as he may deem adviſeable; becauſe the prophet, although he did not fix any ſhare for women or children, yet was accuſtomed to allow them a ſmall part; and alſo, becauſe the prophet once demanded aid from a certain party of *Jews* againſt another party of the ſame people, and yet did not allow them any thing in the manner of a *ſhare* or *lot*; and alſo, becauſe *Jihâd* [war with infidels] is an act of piety, of which *Zimmees* are held incapable; and women and children are unable to perform this duty, whence it is not an injunction upon them; and in the ſame manner, a ſlave alſo is unable, as he cannot engage in war or battle without the conſent of his owner: yet it is requiſite that they be allowed ſomething, in order that they may be encouraged to fight, and that the inferiority of their ſtation be rendered manifeſt. (A *Mokâtib* is in the ſame predicament with an abſolute ſlave in this particular, ſince he is ſtill in a ſtate of bondage, and it is poſſible that, as he may be unable to diſcharge his ranſom, his maſter will not permit him to engage in fight.)—It is proper to remark, however, that this ſmall allowance out of the plunder is not paid to a ſlave, except where he *actually fights*, as he goes into the enemy's country merely for the purpoſe of waiting upon his maſter, and is therefore in the ſame ſituation with a merchant who goes into the enemy's country for the purpoſe of *traffic*, and not with a view to *fighting*. In the ſame manner, this allowance is not paid to a woman unleſs ſhe attend the ſick and wounded and prepare their medicines; becauſe ſhe is unable actually to *fight*; but her attendance and aſſiſtance are admitted as ſubſtitutes for fighting: contrary to the caſe of a *ſlave*, as he is able actually to engage in fight. In the ſame manner, this allowance is not paid to a *Zimmee*, unleſs where he fights, or where he acts as a guide, which is alſo of advantage to the *Muſſulmans*; and in this laſt caſe it is lawful to pay him even *more* than the ſhare of a *Muſſulman*, if his acting as a guide be attended with any eminent advantage:—but when he only *fights*, what

Zimmees, acting as *guides*, may be paid an extraordinary gratuity.

what is paid him muſt be ſhort of a *Muſſulman*'s ſhare, becauſe fighting is *Jihâd*, and a *Zimmee* cannot be put upon a footing with a *Muſſulman* in the rules of *Jihâd*: contrary to the caſe of acting as a guide, ſince that is not *Jihâd*, and he may therefore receive a conſideration for it, to any amount, in the ſame manner as for any other ſervice.

THE *Khams*, or fifth, of the plunder * muſt be divided into three equal portions, one portion for *orphans*, one for the *poor*, and one for *travellers* †.

IF one or two particular perſons enter a hoſtile country, with a view to pillage, without authority from the *Imâm*, and make a capture of property, it is not ſubject to *Khams*; becauſe there is no *Khams* in any thing but *plunder*, and the property in queſtion is not *plunder*, as this term is applied ſolely to ſuch property as is taken from the infidels by *open force*, and not by *theft* or *pillage*; and the property in queſtion is not taken by *open force*.

IF one or two particular perſons enter a hoſtile country, by authority of the *Imâm*, and make capture of property, there are two opinions related concerning it; but the moſt generally received opinion is that a fifth is to be deducted from it, becauſe the *Imâm*, in giving them this authority, undertakes to ſupport them with ſuccours, if neceſſary, and hence they in this caſe ſtand as perſons engaged in war in a *public* ſenſe.

IF a party enter a hoſtile country, in force, and make a capture of property, what they take is ſubject to *Khams*, although they act without the authority of the *Imâm*; becauſe this property has been taken openly, by force of arms, and therefore falls under the deſcription of *plunder*;—and alſo, becauſe it is incumbent upon the *Imâm* to aſſiſt them, ſince if he were not to do ſo, the *Muſſulmans* might appear weak and unable to oppoſe their enemies:—contrary to the caſe of *one* or *two* particular perſons, ſince to aſſiſt *them* is no way incumbent upon the *Imâm*.

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* Set apart by the *Imâm*, as before-mentioned.

† A long train of reaſoning, chiefly conſiſting of verbal criticiſms, and the legality of beſtowing a part of the fifth upon the *Hâſhimee* tribe, is here omitted, as being quite uſeleſs, in ſome places not admitting of an intelligible tranſlation.

SECTION.

ANFEEL, *that is, a Gratuity beſtowed upon particular Perſons, over and above their Share of* PLUNDER.

Gratuities muſt be occaſionally beſtowed:

It is laudable in the *Imâm* to beſtow gratuities in time of and by means thereof to encourage the troops to fight, or more properly to render them zealous in fighting,—by declaring (for inſtance) "Whoever kills an infidel ſhall have his garments,"—and ſo forth, (as will be hereafter more particularly mentioned;)—or, by promiſing to any particular body of troops, "I have allotted you one fourth of "the plunder, after deducting the *fifth*;"—becauſe it is laudable to encourage and ſtimulate to fighting, and making war upon the infidels, GOD having commanded his prophet in the *Koran*, ſaying "EXCITE THE BELIEVERS TO BATTLE!—and beſtowing a gratuity in the manner ſpecified is one way of exciting them.—(It is proper to obſerve that gratuity is ſometimes held forth in the manner above deſcribed, and ſometimes in another manner, as if the *Imâm* were to declare "Whoever *finds* any thing, the ſame ſhall be his!")—It is not laudable in the *Imâm* to beſtow the *whole* of the plunder in gratuity, becauſe that is deſtructive of the right of the troops:—if, however, he beſtow the whole, in gratuity, upon any particular party or diviſion of the army, it is lawful, becauſe the management of the plunder is committed to the *Imâm*, and he may ſometimes deem it adviſeable thus to make gratuity of the whole.

but not after the plunder is

IT is not lawful for the *Imâm* to beſtow any gratuity after the plunder is ſecured within the *Muſſulman* territory, becauſe the right of others in it is then confirmed. If, however, he ſee fit, he may beſtow gratuity out of the *Khams*, or reſerved *fifth*, becauſe in that the troops have no right.

ing the *per-ſonal* property

IF the *Imâm* ſhould not beſtow in gratuity the *Sillib* (or perſonal property) of one who is ſlain, upon the ſlayer, it becomes a part of the *general plunder*, in which the ſlayer and others have all an equal ſhare. *Shafeï* maintains that the perſonal effects of the perſon ſlain belong to the ſlayer, provided the latter be one of thoſe who are entitled to ſhare in the plunder, and that he killed the ſlain in open fight, becauſe the prophet has ſaid, "*Whoever ſlays an* INFIDEL *is* "*entitled to his perſonal property.*"

OBJECTION.—It is poſſible that the prophet may have mentioned this merely in a *gratuitous* ſenſe, and not as the award of the LAW.

REPLY.—It is evident, from the ſituation of the prophet, that he ſpoke this as an award of the LAW, ſince he was ſent to enforce the awards of the LAW. A perſon, moreover, who kills another prepared to oppoſe him in open fight expoſes himſelf in a ſuperior degree, and hence the perſonal property of the ſlain goes to him, for the purpoſe of making a diſtinction between him and others.

—The arguments of our doctors upon this point are twofold.—FIRST, the perſonal property in queſtion has been taken, virtually, by the force of the *whole* army *, and is therefore plunder; and ſuch being the caſe, it is to be generally ſhared, in the ſame manner as other ſpoil, in conformity with the words of the ſacred text:—SECONDLY, the prophet

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* Becauſe, without being accompanied and ſupported by the *army*, the *ſlayer* never could have come at

once

ſaid to *Moorkheeb-Bin-Abee-Silma.* "*No more appertains to you of the property of the perſon you have ſlain, than your* IMÂM *may think proper to allow.*"—With reſpect to the ſaying of the prophet cited by *ſeï*, it bears the conſtruction both of the *award of the* LAW, and alſo of *gratuity*; and our doctors receive it in the *latter* ſenſe, becauſe of the ſaying above quoted, and alſo, becauſe no regard is to be had to any ſuperior degree of expoſure or fatigue in war, as was already demonſtrated in treating of the operations of cavalry. By *Sillib* is underſtood whatever may be found upon the perſon of the ſlain, ſuch as *clothes*, *weapons*, and *armour*; and alſo the animal upon which he rode, together with the equipage, ſuch as the *ſaddle* and ſo forth,—or whatever may be found upon him in his girdle or pockets, ſuch as a purſe of gold and ſo forth:—but any thing beyond theſe is not *Sillib*; nor is any thing ſo which is carried upon another animal by his ſervant.

Gratuity does

it be brought into the *Muſſulman* territory.

IT is a rule, with reſpect to gratuity, that the right of others in whatever may be ſo beſtowed is terminated: but yet it does not become the property of the perſon to whom it is awarded until it be ſecured within the *Muſſulman* territory, according to what has been already advanced; and conſequently, if the *Imâm* were to declare, "*Whoever finds a female ſlave, ſhe is his*," and a *Muſſulman* afterwards find a female ſlave, and aſcertain his right in her, yet it is not lawful for him either to have carnal connexion with her, or to ſell her, in the hoſtile country.—This is according to the two *Elders*. *Mohammed* aſſerts that he may lawfully do either, becauſe he holds that gratuity eſtabliſhes a right in a thing in the ſame manner as diſtribution of plunder in a hoſtile country, or purchaſe from the hands of an alien:—and ſome allege that *Mohammed* alſo holds that ſatiſfaction is due from any perſon who ſhould deſtroy this ſpecies of plunder,—whereas, with the two *Elders*, it is not due.

CHAP. V.

Of the Conqueſts of *In*

If infidels of *Turkiſtan* conquer infidels of *Rome*[*], and make captives of them or ſeize their property, they are the rightful preprietors[†], becauſe here is eſtabliſhed a ſubjugation over neutral[‡] property, which is a cauſe of propriety, as ſhall be hereafter ſhewn: and if *Muſſulmans* ſhould afterwards conquer thoſe infidels of *Turkiſtan*, whatever property of the infidels of *Rome* they may find with theſe infidels of *Turkiſtan* is lawful to them, in the ſame manner as their other original property. In the ſame manner, if *infidels* obtain poſſeſſion, by conqueſt, of the effects of *Muſſulmans*, and ſecure the ſame (that is, carry them into their own country,) they are the rightful proprietors thereof. *Shafei* maintains that they do not become the proprietors, becauſe their conqueſt over the property of *Muſſulmans* is unlawful both in the beginning and alſo in the end; and he holds that what is *unlawful* cannot create a right of property. Our doctors, however, allege that as the conqueſt of infidels over the property of *Muſſulmans* is a conqueſt over *neutral* property, it creates a right, in the ſame manner as the conqueſt of *Muſſulmans* would give them a right over the property of infidels. The ground of this opinion is

Infidels ac-

gain by con-
queſt, whether

or from *Muſ-*

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[*] This term is uſed by the people of *Aſia* in a very extenſive ſenſe, comprehending the whole of the antient *Roman* empire: it here applies, in particular, to the eaſtern provinces of the *Turkiſh* empire, which ſome *European* writers diſtinguiſh by the appellation of *Romelia*. *Turkiſtan* is a large region lying to the eaſt and ſouth-eaſt of the *Caſpian* ſea.

[†] Meaning that the right of the original proprietors is diſſolved and rendered void.

b. Mobah. The meaning of this term is explained at large elſewhere.

that the property in queſtion becomes *neutral* upon being ſecured within the alien territory; becauſe property is originally *neutral* with reſpect to any perſon whatever, as God has ſaid "THE WHOLE THAT "THE EARTH CONTAINS HATH BEEN CREATED FOR YOU," (that is, for *mankind*;) every thing, therefore, upon the face of the earth, is deſigned alike for the uſe of all, and is not appropriated to any perſon in particular; whoever pleaſes may enjoy it: but yet, certain of that property becomes appropriated to certain individuals by one or other of the cauſes of right of property, ſuch as *purchaſe*, *inheritance*, and ſo forth, in order that the individual may be enabled to make uſe of it; for if property were not thus appropriated, others would be continually interfering in the enjoyment of it: for this reaſon, therefore, and of neceſſity, certain property is aſſigned to certain individuals, who are reſpectively the proprietors. Now, when the infidels carry the property of the *Muſſulmans* into their own territory, the proprietor is diſabled from enjoying it any longer; and ſuch being the caſe, the cauſe aforeſaid, which was the occaſion of the property being appropriated to the *Muſſulman*, ceaſes; and the cauſe ceaſing, the property becomes neutral, in the ſame manner as it was originally neutral: it being demonſtrated, therefore, that the property, upon being carried by them into their own territory, becomes *neutral*, it follows that the conqueſt of the infidels over it is then a conqueſt made by them over *neutral* property, which is a cauſe of propriety; and hence they become the proprietors. It is to be remarked, however, that their conqueſt over the property is not eſtabliſhed until after its being *ſecured* within their territory; becauſe *ſecuring* ſignifies being endowed with power over the article ſecured, (namely, the property) with regard both to *circumſtance* and to *ſubſtance*; now, ſo long as the infidels do not carry the property into their own territory, their power over it is not ſubſtantiated, ſince whilſt it continues in the *Muſſulman* territory it is evident that the *Muſſulmans* may rally and recover it out of the hands of the infidels. With reſpect to what is alleged by *Shafei*, that "their conqueſt over "the property of *Muſſulmans* is *unlawful*, and a thing which is unlawful

“ lawful cannot be a cauſe of a right of property,”—we reply, that the conqueſt is unlawful, for another reaſon*; becauſe the property in queſtion is in its *original* nature *neutral*, (as has been already explained,) and conqueſt over neutral property is not unlawful; the conqueſt, alſo, in the preſent inſtance, is unlawful only from a *ſupervenient* cauſe, namely the proprietory of the owner: it therefore appears that it is unlawful for *another reaſon*; and a thing which is unlawful for *another reaſon* may yet cauſe a right, as in the inſtance of *ſale* during the time of calling to public prayers. It is to be obſerved, however, that if the *Muſſulmans* afterwards ſubdue the infidel territory, and the original proprietors of the property in queſtion find it before the chief has made the diſtribution among the troops, ſuch property is reſtored to the proprietors without any return: and if they find it *after* the diſtribution, they are entitled to take it upon payment of the value; becauſe the prophet, in a ſimilar caſe, ſaid to the owner of a property, “ *If you find your property* BEFORE *the diſtri-* “ *bution, it is yours without any return*; *and if,* AFTER *the diſtribu-* “ *tion, it is your's for the value*;—and alſo, becauſe the right of the former owner has been deſtroyed without his conſent, and hence he has a right, out of tenderneſs to his ſituation, to reclaim it: but if he were allowed to take it, after diſtribution, without giving an equivalent, an injury would follow to the perſon in whoſe ſhare it may happen to be included; and hence it is ſaid that he is at liberty to take it from that perſon *in return for the value*, in order that tenderneſs may be obſerved towards both. Previous to the diſtribution, on the other hand, the partnerſhip in the property is *general*,—(that is, it appertains equally to all the warriors,)—and hence if the proprietor then take it, without any return, the injury to each individual is trifling, for which reaſon the owner is then allowed to take it without paying an equivalent.—If, alſo, a merchant go into the infidel territory,

but
ſulman proprietors have

before the infidels have made a diſtri-

alſo, *after* the diſtribution, upon payment of an equivalent.

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* *Unlawful for another reaſon*; that is, not unlawful *in its own nature*, but rendered ſo by ſome extraneous circumſtance.

with reſpect to property recovered in the way of *traffic.*

and there purchaſe property which had been plundered from the *Muſſulmans*, and bring it into the *Muſſulman* territory, in this caſe the former proprietor has it in his choice either to take the property from the merchant, paying to him the price for which he had purchaſed it, or to leave it; but he is not at liberty to take the property from the merchant *without* a return, as this would be injurious to him, ſince he obtained poſſeſſion of it by paying the value. The rule here laid down is therefore an act of tenderneſs to both. If, moreover, the merchant had purchaſed the property by paying other property for it, the former proprietor is at liberty to take it upon paying the value of ſuch property:—and if the infidels have made a *gift* of the property to the merchant, the former proprietor is at liberty to take it *upon paying the value*, becauſe, as the merchant had become poſſeſſed of it by an excluſive right, ſuch right cannot be deſtroyed but in return for the value.—What is here advanced proceeds upon a ſuppoſition of the property in queſtion being a thing of a nature not compenſable by its like. Where, on the other hand, it is compenſable by its like, if it be brought into the *Muſſulman* territory as *plunder*, the former proprietor is at liberty to reclaim it at any time before the diſtribution; but he is not at liberty to reclaim it in return for its like *after* the diſtribution, ſince in taking it in return for its like there is no advantage. In the ſame manner, alſo, if the infidels ſhould have preſented it as a *gift* to the merchant, the former proprietor is not at liberty to reclaim it in return for its like, ſince in this there is no advantage; and ſo alſo, there is no advantage, where the merchant had purchaſed it in return for its like with reſpect to *quantity* or *quality*. If, however, the merchant have purchaſed it for *leſs* than its quantity, or in return for ſomething of a *different* kind, or for an article of the *ſame* kind, but in a ſtate of *decay*, in either of theſe caſes the former proprietor is at liberty to reclaim it in return for the like of whatever the merchant had purchaſed it with.

Caſes of the

If the *infidels* ſhould make captive and carry off into their own country the ſlave of a *Muſſulman*, and any perſon were afterwards to purchaſe the *infidels.*

purchaſe and bring him back into the *Muſſulman* territory, and any one were after that to put out the ſlave's eyes, and this perſon exact the fine,—the former proprietor is at liberty to reclaim the ſlave in return for the price for which this perſon had purchaſed him of the infidels: but he muſt not deduct any thing on account of the *eyes*, becauſe the eye-ſight is a natural quality, or *ſenſe*, and the *ſenſes* are not eſtimable at any price;—neither is he at liberty to take from this perſon the amount of the *fine* on account of the eyes, becauſe the ſlave, at the time of putting out his eyes, was the lawful property of the perſon in queſtion, whence *he* took the fine, as being the proprietor.

IF the infidels take and carry off the ſlave of a *Muſſulman* into their own territories, and a perſon there, purchaſing him for one thouſand *dirms*, bring him back into the *Muſſulman* territory, and the infidels again take him and carry him off into the infidel territory, and another perſon ſhould then, in the ſame manner, purchaſe him for one thouſand *dirms*, and bring him back into the *Muſſulman* territory,—in this caſe the former proprietor cannot demand the ſlave of the ſecond purchaſer; becauſe, when taken and carried off a *ſecond* time, he was not *his* property: but the *firſt* purchaſer may demand the ſlave of the *ſecond* purchaſer for the price at which he had bought him of the infidels, becauſe the ſlave, when taken the *ſecond* time, was *his* property; and then, if the former proprietor chuſe, he may take the ſlave of the firſt purchaſer on paying him two thouſand *dirms*, becauſe the ſlave has fallen to the latter at that ſum; the original proprietor may therefore, if he pleaſe, take him for two thouſand *dirms*.—It is a rule that the original proprietor is not empowered to take the ſlave of the *ſecond* purchaſer, where the *firſt* happens to be abſent, in like manner as he is not empowered to take him of the ſecond purchaſer where the firſt purchaſer is *preſent*.

Infidels do not, by capture, make a

birs, Am-Walids, or

Muſſulr

If the infidels attack and conquer a *Muſſulman* territory, yet they do not, by conqueſt and conveyance into the infidel territory, become proprietors of the *Modabbirs* of *Muſſulmans*, nor of their *Am-Walids* or *Mokâtibs*, or of freemen, whether *Muſſulmans* or *Zimmees*; whereas *Muſſulmans*, on the contrary, by conqueſt in the infidel territory, become proprietors of all thoſe; becauſe conqueſt, which is a cauſe of right of property, produces a right of property in reſpect to a ſubject which is capable of it; and the ſubject capable of it is *neutral property*; now, a free *Muſſulman*, and ſo alſo a free *Zimmee*, are not *neutral property*, being in their own nature protected and inviolable; and in the ſame manner, their *Modabbirs*, *Am-Walids*, and *Mokâtibs*, becauſe in theſe alſo freedom exiſts in one ſhape: contrary to the perſons of infidel aliens, whether they be *free*, *Am-Walids*, *Modabbirs*, or *Mokâtibs*, becauſe the legiſlator has withdrawn protection from them, and has made them *neutral property*, in retribution for their ſin of infidelity.

nor of an *abſconded* ſlave.

If the ſlave of a *Muſſulman* deſert into the infidel territory, and the make him captive, they do not become his proprietors, according to *Haneefa*.—The two diſciples ſay that they become the proprietors, becauſe the protection of the ſlave on behalf of his proprietor exiſted in virtue of the proprietors ſeizin, or actual poſſeſſion of him; and in the caſe in queſtion this poſſeſſion is deſtroyed; whence it is that if the infidels were to take the deſerter within the *Muſſulman* territory, and carry him off to their own country, they would become his proprietors.—The argument of *Haneefa* is that the ſlave, upon going out of the *Muſſulman* territory, becomes at his own diſpoſal, in the ſame manner as a freeman; becauſe a regard to his being in poſſeſſion of his own perſon had ceaſed only in order that the poſſeſſion of his maſter might be eſtabliſhed, to enable him to make uſe of it; and, in the caſe in queſtion, upon the poſſeſſion of the maſter being deſtroyed, the ſlave's poſſeſſion of his own perſon takes place, and he becomes in his own nature inviolable, in the ſame manner as a freeman; wherefore he no longer remains a ſubject of acquiſition: contrary to an abſconded ſlave whilſt in the *Muſſulman* territory, ſince he ſtill continues in the poſſeſſion of his maſter, in virtue of the continuance of the *Muſſulman* power within that territory. So long, therefore, as the poſſeſſion of him by the maſter continues, his poſſeſſion of his own perſon does not appear, wherefore he is not at his own diſpoſal; and hence, if the infidels were to take and carry him off to the infidel territory, they would become his proprietors.—It is proper to obſerve in this place, that as the ſlave, in the preſent inſtance, is not the property of theſe infidels, the former proprietor is entitled to reclaim him without any return in all the caſes before treated of,—that is, in caſe of the infidels having preſented him in gift to any perſon, who afterwards brings him into the *Muſſulman* territory,—or in caſe of any perſon *purchaſing*, and ſo bringing him into the *Muſſulman* territory,—or in caſe of the *Muſſulmans* making him captive in the way of plunder, and bringing him into the *Muſſulman* territory. In this laſt caſe, alſo, the former proprietor is at liberty to reclaim him without any return either *before* or *after* the diſtribution of the plunder; and if he ſhould take him, *after* the diſtribution, from the perſon to whoſe ſhare he has fallen, that perſon muſt be reimburſed out of the *public treaſury*, a proportionable reimburſement from *each individual* being impoſſible, ſince the warriors are by that time all ſeparated and gone different ways, and cannot again be brought together.—It is alſo to be obſerved, that the perſon who had obtained the ſlave by gift, purchaſe, or plunder, is not entitled to take any reward on account of the ſlave from the proprietor; becauſe either of theſe appears to have acted ſolely on his own account, and under a conception that the ſlave is thereby rendered his property.

ſlave may,
every in-

tor.

A ſtray animal becomes
the property
of the infidel

IF a camel, the property of a *Muſſulman*, ſtray into the country of the infidels, and they lay hands upon it, they become the proprietors, in virtue of the eſtabliſhment of their ſuperiority over it; ſince a *brute* is incapable of being at its own diſpoſal, in ſuch a manner that the camel ſhould become poſſeſſed of his own perſon upon quitting the *Muſſulman* territory:—contrary to the caſe of a ſlave, according to what was before ſtated.—If, alſo, a perſon were to *purchaſe* the camel, and bring it back into the *Muſſulman* territory, the original proprietor is entitled to take it upon paying that perſon the price for which he had purchaſed it.

but may be reclaimed by the owner on being brought back.

Caſe of a ſlave abſconding with property.

If the ſlave of a *Muſſulman* abſcond into the infidel territory, carrying with him a horſe, or other effects, and the infidels ſeize the whole, and a perſon afterwards purchaſe the whole, and bring them back into the *Muſſulman* territory, the former proprietor is at liberty to take his ſlave without any return, and to take the horſe or effects upon paying the price for which they had been purchaſed.—This is the doctrine of *Haneefa.*—The two diſciples aſſert that the former proprietor is at liberty to take, in return for the price, the ſlave, together with the accompanying property.—This difference of opinion ariſes from *Haneefa* holding that the infidels do not in this caſe become proprietors of the ſlave, in the ſame manner as where the ſlave abſconds *alone* into the infidel territory, (that is, without carrying any thing along with him,) in which caſe the infidels do not become his proprietors, as has been already explained;—whereas the two diſciples hold that they become proprietors in this caſe, in the ſame manner as where the ſlave abſconds into the infidel territory without carrying any thing along with him; as was before ſtated.

A *Muſſulman* ſlave, purchaſed by an infidel, becomes free upon entering an infidel territory,

If an infidel alien come under protection into the *Muſſulman* territory, and there purchaſe a ſlave who is a *Muſſulman*, and carry him into the infidel territory, the ſlave becomes free, according to *Haneefa.*—The two diſciples ſay that he does not become free, becauſe the right of the former owner has been deſtroyed by the *ſale*, and the ſlave has become the property of the infidels, and the power of controul over the ſlave no longer remains to the former proprietor; the ſlave, therefore, continues in bondage with the infidel.—The argument

ment of *Haneefa* is that it is incumbent to releaſe a *Muſſulman* from the degradation of ſubjection to an *infidel*; wherefore ſeparation of country, which is the *condition* of the deſtruction of proprietorſhip, is made the ſubſtitute of manumiſſion, which is a *cauſe* of the deſtruction of proprietorſhip, for the purpoſe of releaſing a *Muſſulman*, in the ſame manner as the lapſe of three menſtruations is a ſubſtitute for ſeparation, in a caſe where a huſband or wife embraces the faith in a foreign country.

The ſlave of an infidel, upon becoming a *Muſſulman*, acquires a rig to freedom:

IF the ſlave of an infidel alien become a *Muſſulman*, and then paſs into the *Muſſulman* territory, or the *Muſſulmans* conquer the infidel territory, ſuch ſlave is free; and in the ſame manner, if the ſlave of an infidel alien embrace the faith, and deſert to the *Muſſulman* camp, he is free;—becauſe of what is recorded, that certain ſlaves of the people of TAYEEF, having embraced the faith, came over to the prophet, and he announced their freedom, ſaying "*thoſe are the* "*freedmen of* GOD!"—and alſo, becauſe the ſlave in queſtion, where he takes refuge within the *Muſſulman* territory, has placed his perſon in protection, in virtue of his coming there againſt his owner's will;—or, where the *Muſſulmans* conquer the infidel territory, has placed his perſon in protection, by joining the *Muſſulmans*; ſince his poſſeſſion of his own perſon is to be regarded preferably to the poſſeſſion obtained over him by the *Muſſulmans*, as the former took place previous to the latter, he being at his own diſpoſal; and he has no occaſion to take formal poſſeſſion of his own perſon,—nay, he requires no more than that his poſſeſſion over his own perſon ſhould be more fully confirmed, ſince that poſſeſſion is unconfirmed, on account of the appearance of the maſter's right: contrary to others, as they are deſirous of eſtabliſhing a poſſeſſion over him *ab initio*;—his poſſeſſion of his own perſon, therefore, is to be regarded in preference.

CHAP. VI.

Of the Laws concerning *Mooſtâmins*[*].

reſiding under a protection in a hoſtile country muſt not moleſt the inhabitants.

If a *Muſſulman* go as a merchant into a hoſtile country[†], it is not lawful for him to moleſt the inhabitants either in perſon or property, becauſe he, in his acceptance of a protection, has undertaken to obſerve this forbearance towards them; any moleſtation of them afterwards would therefore be a breach of agreement; and a breach of agreement is prohibited.—It is therefore unlawful for him to moleſt them in perſon or property, unleſs where the ſovereign of the country breaks the engagement with reſpect to him, by ſeizing his property, or throwing him into priſon,—or where others do ſo with the ſovereign's knowledge, he not preventing them,—in which caſe it is lawful for the merchant to moleſt them in perſon and property, as here the breach of contract is on *their* part. It is otherwiſe in the caſe of a *captive*, to whom it is lawful to moleſt them in perſon and property, although they ſhould releaſe him of their own accord, becauſe a *captive* is not under protection.—It is proper, however, to obſerve that if the merchant break his agreement with the people of the country, and ſeize any of their property, and bring the ſame into the *Muſſulman* territory, he becomes the proprietor, becauſe his acquiſition of power over neutral property is eſtabliſhed;—but yet in his poſſeſſion of it there is an abomination, becauſe the property has been obtained by a breach of treaty, and this is the occaſion of abomination with reſpect to that property; and hence the merchant muſt be directed to beſtow it in alms.

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[*] Perſons reſiding in a foreign country, under a protection procured from the ſtate or ſovereign of that country.

[†] Arab. *Dar-al-hirb*: meaning, any *foreign* country under the government of *infidels*. The tranſlator generally renders it *foreign country*.

No decree

re-

between a

two ali
a foreign
country,

IF a *Muſſulman*, having procured a protection, go into a foreign country, and there purchaſe goods of an alien upon credit, or diſpoſe of his goods to the alien upon credit, or uſurp the property of an alien, or an alien uſurp his property, and he afterwards return into the *Muſſulman* territory under a protection, in none of theſe caſes is the *Kâzee* to paſs any decree againſt one of thoſe in favour of the other:—not in inſtance, becauſe the validity of a decree of the *Kâzee* reſts upon his authority, and here the *Kâzee* was poſſeſſed of no authority whatever at the time of the debt being contracted, with reſpect either to the debtor or the creditor, on account of ſeparation of country;—neither is he poſſeſſed of any authority with reſpect to the protected alien at the time of the decree, as the alien has not undertaken to ſubmit to the *Muſſulman* laws with regard to acts done in time paſt, he undertaking only for the *future*, that is, from the period of his being admitted to protection:—nor in the *ſecond* inſtance, becauſe the property uſurped has become the property of the uſurper, as the uſurper's acquiſition of power over what he has uſurped is an acquiſition of power over neutral property, according to what has been before ſtated.—If, moreover, *both* of thoſe perſons were aliens, and one of them act by the other as above deſcribed, and they both afterwards come, under a protection, into the *Muſſulman* territory, the rule is the ſame, for the reaſons here mentioned:—but if both become *Muſſulmans*, and then come into the *Muſſulman* territory, in this caſe the *Kâzee* may paſs a decree with reſpect to the *debt*, becauſe the debt of the one to the other is a lawful debt, as having been voluntarily engaged in; and the authority of the *Kâzee* exiſts with reſpect to both, at the time of the decree, as they have then both ſubmitted to the laws of *Iſlâm*, by embracing the faith.—If, however, one of them ſhould have *uſurped* property belonging to the other, in this caſe the *Kâzee* cannot paſs any decree whatever, according to what was before obſerved, that " the uſurper becomes proprietor of what he has uſurped."

Caſe of a *Muſſulman* uſurping the property of an *alien* who afterward becomes a *Muſſulman*.

If a *Muſſulman*, having procured a protection, go into a foreign country, and there uſurp the property of an alien, and the *Muſſulman* and the alien (having become a *Muſſulman*) come into the *Muſſulman* territory, a notice is to be iſſued to the *Muſſulman* uſurper, in the *manner* of a decree, directing him to reſtore the uſurped property to the converted alien; but the *Kâzee* muſt not iſſue any poſitive *decree* upon the ſubject, for the reaſon before mentioned, that the uſurper becomes *proprietor* of what he has uſurped.—The notice in the *manner* of a decree is becauſe the article uſurped has become the property of the uſurper by an invalid appropriation, on account of the breach of compact, which is unlawful.

Caſe of one *Muſſulman* ſlaying another *Muſſulman* in a foreign country.

If two *Muſſulmans* go under protection into a foreign country, and one of them kill the other, either *wilfully* or *accidentally*, no retaliation is incurred; but the fine of blood is due from the ſlayer's property,—and an *expiation* is alſo incumbent upon him, where the act was accidental.—The reaſon why expiation is incurred is that the text of the *Koran*, upon which the obligation of it is founded, is general, and is not reſtricted to the *Muſſulman* territory.—The reaſon why the fine of blood is due, is that the protection of the perſon, eſtabliſhed by reſidence within the *Muſſulman* territory, is not annulled by the ſupervenient circumſtance, namely, the going under protection into a foreign country:—and the reaſon why *retaliation* is not incurred is that the infliction of retaliation is impracticable without the power*, and no power exiſts in the foreign country in the preſent inſtance, as power cannot be eſtabliſhed but through the *Imâm*, and the collective body of *Muſſulmans*.—The reaſon why the fine of blood is due from the *property* of the ſlayer, in the caſe of *wilful* homicide, and not from his *tribe*, is that the fine for wilful murder is in no caſe due from the *tribe*;—and the reaſon why it is not due from the *tribe*, in the caſe of *accidental* homicide, is that, in the caſe in queſtion, the tribe of the ſlayer have it not in their power to prevent the ſlayer from committing the homicide, or to guard againſt it; as they are in the *Muſſulman* territory, and the ſlayer in a foreign country; and the fine for homicide falls upon the *tribe* of the ſlayer, only on account of their neglecting to guard againſt it, which is not the caſe in this inſtance.

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* Meaning the *executive power*, acting under the regular lawful authority.

Caſe of one

IF of two *Muſſulmans*, who are captives in a foreign ſtate, one kill the other,—or, if a *Muſſulman* reſiding as a merchant in a foreign country kill another who is a captive there,—in either caſe nothing is due from the ſlayer, except expiation where the act was *accidental.*—This is according to *Haneefa.*—The two diſciples maintain that, in the former caſe, the fine of blood is due, whether one of the captives have ſlain the other *wilfully* or *accidentally*; becauſe the protection of their perſons is not annulled by the ſupervenient circumſtance, (namely *captivity*,) in the ſame manner as the protection of a *Muſſulman*'s perſon is not annulled by the ſupervenient circumſtance of his obtaining protection and going into a foreign country under its influence,—as was before demonſtrated:—but *retaliation* is not incurred, becauſe power does not exiſt in a foreign country, and the exaction of retaliation depends upon the exiſtence of power, as has been already ſtated.—The fine of blood is alſo due from the *property* of the ſlayer, and not from his *tribe*, as before mentioned.—The argument of *Haneefa* is that a *Muſſulman*, by becoming a captive to the infidels, is a dependant on them, as he is ſubjected to them, and in their power; (whence it is that he is *ſtationary* from their being *ſtationary*, and a *traveller* from their *travelling*;) and ſuch being the caſe, the protection of his perſon is abrogated; he is therefore in the ſame predicament with a *Muſſulman* who has never yet retired out of the infidel territory *.—The reaſon for reſtricting the neceſſity of expiation, in all theſe caſes, to *accidental* homicide, is that (according to our doctors) there is no expiation in a caſe of *wilful* homicide.

SECTION.

If an alien come, under a protection, into a *Muſſulman* territory, the *Imâm* muſt not ſuffer him freely to reſide there for the complete term of a *year*, but muſt give him notice that " if he ſhould remain " the full year he will impoſe *Jizyat* [capitation-tax] upon him."—The reaſon of this is that an alien is not to be allowed to continue in the *Muſſulman* territory for any conſiderable ſpace of time, except in ſlavery, or in conſideration of paying the capitation-tax; becauſe, if an alien were to continue for a conſiderable term in the *Muſſulman* territory in any other than one of thoſe two ſtates, he might become a *ſpy* on behalf of the alien infidels, to the detriment of the *Muſſulmans*. He may be allowed, however, freely to remain for a *ſhort* time, for if a *ſhort* reſidence were prohibited, all intercourſe would be prevented, and the door of *commerce* would of courſe be cloſed.—Our doctors have fixed the definition of a *long* ſpace of time to the term of *one year*, [or upwards,] becauſe a year is the term in which capitation-tax becomes due.—If, therefore, the protected alien return to his own country before the completion of the year, after the *Imâm* ſhall have given him notice, as above, he is not to be moleſted, nor can the *Imâm* demand any capitation-tax from him:—but if he continue in the *Muſſulman* territory for a whole year, he becomes a *Zimmee*, or ſubject; becauſe, when he remains a year in the *Muſſulman* territory after the *Imân*'s notice to him, it is known that he undertakes to pay capitation-tax; and he becomes a ſubject of courſe.—It is lawful for the *Imâm*, however, to reſtrict the free continuance of an alien in the *Muſſulman* territory to any term *ſhort* of a year, (ſuch as *one* or *two months*, for inſtance,) by giving him notice, that “if he ſhould remain beyond ſuch a time, he will impoſe a capitation-tax upon him;” after which, if he continue beyond the time preſcribed, he becomes a *Zimmee:*—and after becoming a *Zimmee*, if he be deſirous of returning into his own country, he may be prevented; becauſe a contract of fealty cannot be diſſolved, ſince by the diſſolution of it a ſtop is put to the receipt of capitation-tax; and another conſequence alſo is induced, that ſuch children as are born to him after the diſſolution of the contract are aliens, and of courſe enemies to the *Muſſulmans*, which would be injurious to the latter.

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* Meaning an *alien* converted to the *Muſſulman* faith.

An alien becomes a *Zimmee* upon the *trib*

If an alien come, under a protection, into the *Muſſulman* territory, and there make a purchaſe of tribute-land, and the tribute thereof be impoſed upon him, he becomes a *Zimmee*, or ſubject; becauſe tribute upon land is the ſubſtitute of a tax upon the perſon, (namely, *capitation-tax*;) and hence, when he undertakes the payment of *tribute*, it is known that he has become a reſident in the *Muſſulman* territory. He does not, however, become a *Zimmee* immediately on the purchaſe of the land, nor until ſuch time as he undertakes the payment of tribute, ſince an alien may purchaſe land in the way of *traffic:*—but upon becoming ſubject to *tribute*, he alſo becomes liable to capitation-tax for the enſuing year, becauſe by ſubmitting to tribute he becomes a *Zimmee*, and hence the term of his capitation-tax is to be accounted from the time of his ſubmitting to tribute.

and is then liable to *capitation-tax.*

An alien woman becomes a ſubject by marrying a *Zimmee:*

If an alien woman come, under a protection, into the *Muſſulman* territory, and there marry a *Zimmee* or infidel ſubject, ſhe becomes a *Zimmeea*, becauſe ſhe undertakes to reſide in the *Muſſulman* ſtate, as being a dependant of her huſband.

If

alien does not become a *Zim-*

If a protected alien marry a female infidel ſubject, yet he does not become a *Zimmee*, becauſe it is in his power to divorce her, and ſo return into his own country; his marriage, therefore, does not neceſ- his deſign of becoming a *reſident*.

Caſe of an alien returning to his own country and leaving property in the *Muſſulman* territory.

If a protected alien return into his own country, and leave property in depoſit with a *Muſſulman* or *Zimmee*, or leave a debt due from them to him,—upon going into his own country his blood becomes neutral [*], becauſe by that act he annuls his protection: and with reſpect to ſuch of his property as remains in the *Muſſulman* territory, the rule to which it is ſubject depends upon circumſtances;—for if the alien, after returning to his own country, be made a captive,—or, if an army of *Muſſulmans* conquer that country, and he be ſlain, the perſon indebted to him becomes diſcharged from the debt, and his property left in depoſit becomes public property [†], becauſe the depoſit is ſtill virtually in his hands, ſince the ſeizin of his truſtee is equivalent to his own ſeizin; the property in depoſit, therefore, becomes public property in the ſame manner as his perſon if he were made captive. The reaſon why the debt due to him is remitted is that any thing due to a perſon is accounted to be in his poſſeſſion, only as he is empowered to claim it; now, in the preſent inſtance, his claim has ceaſed; and as the debtor has poſſeſſion of it prior to any other perſon, it becomes his excluſive right; and he is conſequently exonerated from the debt.—If, however, the perſon in queſtion be ſlain, *without* the *Muſſulman* army ſubduing the country,—or, if he happen to die, in either caſe the debt or depoſit goes to his heirs; becauſe as his *perſon*, in this caſe, has not become ſubject to the laws of plunder, it follows that his *property* is not plunder, for this reaſon, that the effect of the protection ſtill remains with reſpect to his *property*, which therefore goes to him, or to his heirs after his deceaſe.

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[*] That is, he may be ſlain without incurring any penalty.

[†] Arab *fee*.—Meaning that portion of the plunder which belongs to the *ſtate*.

It

Every thing gained from aliens without war is the ſtate.

IT is to be obſerved that whenever property belonging to aliens is ſeized by *Muſſulmans*, without *war*, it muſt be expended in defraying all charges of a public nature, in the ſame manner as *tribute*. The learned define this to be *land*, (for inſtance,) the proprietor of which has been ejected by the *Muſſulmans*,—or *capitation-tax*:—and this property is not ſubject to the impoſition of a fifth.—*Shafeï* holds that a fifth is due both from the land in queſtion, and alſo from capitation-tax.—The arguments of our doctors upon this point are twofold. FIRST, it is recorded of the prophet that he exacted capitation-tax, and lodged it in the public treaſury, without deducting the fifth: SECONDLY, the property in queſtion has been ſeized in conſequence of fear for the *Muſſulmans* operating upon the hearts of the infidels, without fighting. It is otherwiſe with *plunder*, as that is ſeized in conſequence of two circumſtances;—*one*, the proweſs of the warriors in fight;—the *other*, the collective force of the *Muſſulmans*; whence a fifth is due to the ſtate on the *former* ſcore, and the remainder to the warriors on the *latter*: and as the former reaſon does not exiſt with reſpect to the property in queſtion, it follows that a fifth is not due from it.

Caſe of an alien, whoſe family and effects are in the alien country, becoming a *Muſſulman* in the *Muſſulman* territory.

IF an alien come, under a protection, into the *Muſſulman* territory, and his wife and children remain in the alien country, and he have alſo property there, lying as a *depoſit*, ſome with an alien, ſome with a *Zimmee*, and ſome with a *Muſſulman*, and he become a *Muſſulman* in the *Muſſulman* territory, and the *Muſſulmans* afterwards ſubdue his country, in this caſe the whole of his property, together with his wives and children, as aforeſaid, are public property,—that is, *plunder*. His wives and adult children are public property, as being *aliens*, and *adults*, and therefore not dependants; and in the ſame manner, the embryo in his wife's womb, (according to what has been already ſtated, in treating of the diſtribution of plunder;) and ſo alſo, his infant children are public property, becauſe an infant child is not held to be a *Muſſulman*, in dependance of the *Iſlám* of his father, unleſs he be in the father's hands, and ſubject to his authority; and in the preſent caſe the infant children of the perſon in queſtion are not ſubject to his authority, ſince he is in the *Muſſulman* territory, and they in a foreign country. In the ſame manner, alſo, his *property* is not under protection, in virtue of the protection of his *perſon*, on account of difference of country, (for he is himſelf in the *Muſſulman* territory, and his property in another country.) The whole of his wives and children, thereſore, together with his property, are *plunder*.—If, however, the alien in queſtion become a *Muſſulman* in his own country, and then come into the *Muſſulman* territory, and his wives and children continue in the alien country, and he have alſo property there, ſome depoſited with a *Zimmee*, ſome with an alien, and ſome with a *Muſſulman*, and the *Muſſulmans* afterwards obtain the ſuperiority in that country,—in this caſe his infant children are accounted *Muſſulmans*, in dependance of their father, becauſe here they were under his authority at the time of his embracing the faith, as he was then in his own country along with his children. Such of his property, alſo, as is in depoſit with a *Muſſulman* or a *Zimmee* appertains to him, as being virtally in his poſſeſſion, ſince the ſeizin of his truſtee amounts to the ſame as his own ſeizin.—Any thing beyond theſe, however, is public property: —his wives and adult children, according to what was before ſtated, that they are *aliens* and *adults*;—and ſuch of his property, alſo, as is in depoſit with an alien, becauſe that is not in a ſtate of protection, ſince the ſeizin of an alien is no protection: contrary to the ſeizin of a *Zimmee* or a *Muſſulman*, as their ſeizin is a protection, whence it is that ſuch property as he may have in their hands does not become the property of the public.

Caſe of an alien proſelyte ſlain by a *Muſſulman* in the alien territory.

If an alien embrace the faith in his own country, and a *Muſſulman* ſlay him, either *wilfully* or *accidentally*, and his heirs alſo embrace the faith there, nothing is due from the ſlayer, except *expiation* where the act was accidental. According to *Shafei*, he is liable to the fine of blood where the act was *accidental*, and to retaliation where it was *wilful*; becauſe he has ſpilled the blood of one whoſe

blood

blood was protected, ſince *Iſlâm* is a protection, as men by *Iſlâm* obtain a claim to reverence. The reaſon of this is that the *Iſmut Mowſma* or *ſin-creating* protection, (that is, the protection in conſequence of which the ſlayer of the protected is an offender,) is the original principle, ſince through that principle determent is obtained;—for whoever is aware that the murder of the protected is a crime will refrain from committing ſuch murder; thus it is proved that the *ſin-creating* protection is the *original* protection; and this protection is eſtabliſhed with reſpect to the *Muſſulman* in queſtion univerſally, ſince no perſon preſumes to allege that the ſlayer of this man is *not* an offender. The *Iſmut-makkowim*, on the other hand, or *protection which bears a price*, (that is the protection in conſequence of which the ſlayer of the protected becomes liable to the *Deyit*, or fine of blood,) is *not* the original principle, but is rather the perfection of the *ſin-creating* protection, ſince by its means determent is more perfectly obtained, from its inducing both *ſin* and *loſs of property*. Now ſuch being the caſe, it is evident that the *appreciable* protection is one deſcription of the *ſin-creating* protection, and it follows that the *appreciable* protection alſo is attached to *Iſlâm* in the ſame manner as the *original* or *ſin-creating* protection is attached to it. Fine and expiation are therefore due for killing an alien who has embraced the faith in a foreign country without retiring into the *Muſſulman* territory.—The argument of our doctors is that GOD has ſaid in the *Koran* "IF THE SLAIN BE OF "A PEOPLE AT ENMITY WITH YOU, AND BE A TRUE BELIEVER, "IT IS INCUMBENT UPON HIS SLAYER TO EMANCIPATE A TRUE "BELIEVER [*]." With reſpect to the arguments of *Shafei*, we reply that his aſſertion, that "the *ſin-creating* protection is attached to *Iſlâm*," is not admitted; for, the *ſin-creating* protection is attached, *not* to *Iſlâm*, but to *the perſon*; becauſe man is created with an intent that he ſhould bear the burthens impoſed by the LAW, which men would be unable to do unleſs the moleſtation or ſlaying of them were prohibited, ſince if the ſlaying of a perſon were not illegal, he would be incapable of performing the duties required of him. The *perſon* therefore is the *original* ſubject of protection, and *property* follows as the dependant thereof, ſince property is, in its original ſtate, *neutral*, and created for the uſe of mankind, and is protected only on account of the right of the proprietor, to the end that each may be enabled to enjoy that which is his own: but the *appreciable* protection applies to *property*, becauſe its being *appreciable* evinces that the atonement for damage muſt be made in an article of the ſame nature with that which is the ſubject of protection: and this is poſſible with reſpect to *property*, but not with reſpect to the *perſon*, becauſe the condition of it is that there be a ſimilarity between the thing damaged and the thing in which the atonement is made, and this ſimilarity may exiſt between *property* and *property*, but not between *property* and a man's *perſon*, ſince ſome property reſembles other property, whereas property cannot reſemble a man's *perſon*.—In *appreciable* protection, therefore, *property* is the *original*, and the *perſon* is a dependant thereof; and when the appreciable protection is eſtabliſhed in property by means of the *ſecurity of country*, (which is the protection of *the ſtate*,) it follows that the protection extends alſo to the *perſon* by means of the *ſecurity of country*: but this does not exiſt with reſpect to an alien who embraces the faith in a foreign country, without retiring into the *Muſſulman* territory; wherefore the price of his blood (namely, the *Deyit*, or *fine of blood*) is not due.

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[*] That is, to procure the emancipation of a *Muſſulman ſlave*: and no fine ſhall be paid, becauſe in this caſe the relations of the murderer, being *infidels* and *aliens*, have no right to inherit after him.

OBJECTION.—A protected alien, who embraces the faith and afterwards apoſtatizes, enjoys *ſecurity of country* from reſidence in the *Muſſulman* territory; wherefore it would follow that the fine of blood would be due for ſlaying ſuch a one; becauſe *appreciable* protection is occaſioned by reſidence in the *Muſſulman* territory, and that exiſts with reſpect to perſons of this deſcription: but we find that the fine of blood is *not* due for ſlaying a perſon of this deſcription[*].

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[*] Becauſe, as being an *apoſtate*, he has forfeited the protection of the *law*.

REPLY.—A protected alien, in the *Muſſulman* territory, is virtually an inhabitant of a foreign country, ſince he intends to return thither: and ſo likewiſe an *apoſtate*, becauſe he alſo is deſirous of going into a foreign country, for fear of his life; ſuch a perſon, therefore, does not enjoy *ſecurity of country* from reſidence in the *Muſſulman* territory.

Caſe of a perſon who has no relations, or a foreign proſelyte, in the *Muſſulman* territory.

IF a perſon ſlay, inadvertently, a *Muſſulman* who has no relations, or an alien who, having come under a protection into the *Muſſulman* territory, has there embraced the faith, the fine of blood falls upon the tribe of the ſlayer; and the ſlayer owes expiation for the homicide, becauſe, as he has ſlain a perſon of protected blood, the rule holds the ſame as with reſpect to all other protected perſons. It is alſo to be obſerved that the *Imâm* takes the fine, as the perſon ſlain has no heirs. If, on the other hand, a perſon *wilfully* ſlay ſuch *Muſſulman* or alien, in this caſe it is at the option of the *Imâm* either to put the murderer to death, or to exact the fine of blood, becauſe here the ſlain is of protected blood, and the killing is *wilful:* and the relations of the murdered perſon are found either in the whole body of *Muſſulmans*, or in the Sultan, as the prophet has ſaid “*The* SULTAN *is the relation of* “*thoſe who are without relations.*”—What is here advanced, that “it is at the option of the *Imâm* to exact the fine of blood,” means that if the *Imâm* chooſe, he may accept of the fine *in the manner of a compoſition*; becauſe the LAW, in a caſe of *wilful murder*, awards only *retaliation*: thus the *Imâm* is at liberty to accept of a fine, as that, in the caſe here treated of, is more advantageous than retaliation. The *Imâm*, is therefore authoriſed to accept of a compoſition in property: but he is not at liberty to *pardon*; becauſe, in the caſe in queſtion, fine or retaliation is the right of the collective body of *Muſſulmans*; and the *Imam*'s authority is eſtabliſhed for the purpoſe of guarding the intereſts of the public; and the remiſſion of their right without ſome return is a deſertion of their intereſt.

CHAP. VII.

Of *Tithe* and *Tribute*.

Definition of the terms.

THE term *Aſhar* [tithe,] in its primitive ſenſe, ſignifies *ten*. *Khirâj* [tribute] ſignifies the product of lands, and the hire of ſlaves; in the language of the LAW it denotes any eſtabliſhed impoſt exacted as a tax upon land, or upon the perſons of *Zimmees*, which laſt is termed *Jiz-*, or *capitation-tax*.

he countries ubject to tithe nd tribute.

THE length of the territory of *Arabia Proper* is from the banks of the river *Uzeib* to the fartheſt part of *Yemn*, which is termed *Amhoora:* and the breadth thereof from *Bereen*, and *Rihna*, and *Raml-Allij* to the borders of *Syria:* and the breadth of the territory of *Irâk-Arabia* is from the *Uzeib* to the back of *Hillwân*; and the length thereof from *Loalba* and *Aloos* to the extremity thereof, which is the fort of *Kotchuck* upon the ſea ſide. Of this region, the lands of *Arabia Proper* are *Aſhooree*, or ſubject to *tithe*,—and thoſe of *Arabia-Irâk* are *Khirâjee*, or ſubject to *tribute*. The reaſons for the *former* of theſe two arrangements are twofold. FIRST, the prophet and the commanders of the faithful [*] did not take tribute upon the lands of *Arabia:* SECONDLY, *tribute* is a ſubſtitute for that part of the plunder which goes to the ſtate, and is therefore not impoſed upon the *lands* of the people of *Arabia*, in the ſame manner as capitation-tax is not impoſed upon their *perſons*, for this reaſon, that one condition of impoſing tribute upon land is that the people to whom the land belongs, be eſtabliſhed there as *infidels*, ſuch as the people of *Irâk* (for inſtance) who were permitted to continue in infidelity, whereas we are enjoined to make war upon the infidels of *Arabia* till they embrace the faith. The reaſon for the *ſecond* arrangement is that *Omar*, when he ſubdued *Irâk*, impoſed tribute upon the lands in the preſence of all the companions: *Amroo Ibn Aas*, moreover, when he conquered Egypt, impoſed tribute upon the inhabitants; and the whole of the companions, in the ſame manner, agreed to impoſe tribute upon the people of *Syria*. It is to be obſerved, however, that the lands of the territory of *Irâk* are the property of the inhabitants, who may lawfully *ſell* or otherwiſe diſpoſe of them; becauſe the *Imâm*, whenever he ſubdues a territory by force of arms, is entitled to re-eſtabliſh the inhabitants in their poſſeſſions, and to impoſe tribute upon their *lands*, and capitation-tax upon their *perſons*; and ſuch being the caſe, the land continues the property of the inhabitants, as was before ſtated, in treating of *plunder*.

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[*] *Arab. Khoolſa-Raſhidine.* The *orthodox Khalifs:* it more particularly applies to the prophet's *immediate ſucceſſors.*

Lands bute *Muſ* **are ſubject to** *tithe:*

and lands reſtored to the *conquered* **are ſubject to** *tribute.*

LANDS, the proprietors of which become *Muſſulmans*, or which the *Imâm* divides among the troops, are *Aſhooree*, or ſubject to *tithe*; becauſe there is a neceſſity that ſomething ſhould be impoſed and deducted from the ſubſiſtence of *Muſſulmans*, and a tenth is the proportion moſt ſuitable to them, as that admits the conſtruction of an oblation and act of piety; and alſo, becauſe this is the moſt equitable method, ſince in this way the amount of what is levied depends upon the actual product of the lands.—Lands, on the other hand, which the *Imâm* ſubdues by force of arms, and then reſtores to the people of the conquered territory, are *Kherâjee*, or ſubject to *tribute*; becauſe there is a neceſſity that ſomething be impoſed and deducted from the ſubſiſtence of infidels; and tribute is the moſt ſuitable to their ſituation, as that bears the conſtruction of a *puniſhment*, ſince it is a ſort of hardſhip, the tax upon *tribute* land being due from the proprietor although he ſhould not have cultivated it. It is to be remarked, however, that *Mecca* is excepted from this rule, as the prophet conquered that territory

General rule for fixing *tithe* or *tribute* upon land.

territory by force of arms, and then reſtored it to the inhabitants, without impoſing tribute. It is written, in the *Jama Sagheer* that all land ſubdued by force of arms, if watered by canals cut by the *Ajimees*, is ſubject to *tribute*, whether the ***Imâm*** have divided it among the troops, or reſtored it to the original inhabitants:—and if there be *no* canals, but the land be watered by ſprings, which riſe within it, it is *Aſhooree*, or ſubject to *tithe*, in either caſe; becauſe *tithe* is peculiar to *productive* land,—that is, land capable of cultivation, and which yields increaſe; and the increaſe produced from it is occaſioned by water. The ſtandard, therefore, by which *tribute* is due is the land being watered by *tribute* water, namely, *rivers*;—and the ſtandard by which *tithe* is due is the land being watered by *tithe*-water, namely, *ſprings*.

land, upon being cultivated, is [illegible] with the neighbouring grounds.

IF a perſon cultivate *waſte* lands, the impoſition of *tithe* or *tribute* upon it (according to *Aboo Yooſaf*,) is determined by the neighbouring ſoils: in other words, if the neighbouring lands be ſubject to *tithe*, a *tithe* is to be impoſed upon it, or *tribute* if they be ſubject to *tribute*; becauſe the rule reſpecting any thing is determined by what is neareſt to it; as in the caſe of a *houſe*, (for inſtance,) the rule with reſpect to which extends to its court-yard*, inſomuch that the owner of the houſe is entitled to make uſe of the court-yard, although it be not his immediate property.

OBJECTION.—According to the tenets of *Aboo Yooſaf*, it would follow that the lands of *Baſſra* ſhould be ſubject to *tribute*, whereas they are not ſo, but are ſubject to *tithe*.

REPLY.—Analogy would ſuggeſt this; but the companions impoſed *tithe* upon it; wherefore the rule is in that inſtance ſet aſide, becauſe of the determination of the companions.

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* *Arab. Finna*; meaning any open ſpace immediately about and contiguous to the walls of a dwelling: but to render it of *lawful* uſe, it muſt be a *thoroughfare*, or belong to the dwelling itſelf.

MOHAMMED alleges that if a perſon cultivate waſte lands by means of water drawn from wells dug in them, or by means of ſprings which riſe in them, or with the waters of the *Euphrates* or the *Tigris*, or with the water of any large river or lake which has no excluſive proprietor, ſuch lands are ſubject to *tithe*; and in the ſame manner, lands cultivated by means of *rain-water*:—but if he cultivate thoſe lands with the water of canals cut by the kings of *Perſia*, (ſuch as the *Kiſſree*, and the *Yezdejird*,) they are ſubject to *tribute*; according to what has been already obſerved, that with him the *water* is regarded, as water is the *occaſion* of increaſe;—and alſo, becauſe the impoſing of *tribute* upon a *Muſſulman* without his previous conſent is impracticable:—in the impoſition, therefore, the *water* is to be regarded, becauſe the tilling of the land with tribute water evinces that the proprietor ſubmits to pay tribute.

Rates of tribute.

THE *tribute* eſtabliſhed and impoſed by *Omar* upon the lands of *Irâk* was adjuſted as follows. Upon every *Joreeb* * of land through which water runs, (that is to ſay, which is capable of cultivation) one *Saa* † and one *dirm* ‡; and upon every *Joreeb* of *paſture*-land, five *dirms* §; and upon every *Joreeb* of *gardens and orchards* ten *dirms* ||, provided they contain vines and date trees. (A *Joreeb* of land ſignifies ſixty *Zirrâa* **, of the *Perſian Zirra*, which is ſeven *Kabzas* ††.) This rule for tribute upon arable and paſture lands, gardens, and orchards, is taken from *Omar*, who fixed it at the rates abovementioned, none contradicting him; wherefore it is conſidered as agreed to by all the companions. Upon all land of any other deſcription, (ſuch as pleaſure-grounds, *ſaffron*-fields, and ſo forth,) is impoſed a tribute according to ability; ſince, although *Omar* has not laid down any particular rule with reſpect to them, yet as he has made *ability* the ſtandard of tribute upon *arable* land, &c. ſo, in the ſame manner, ability is to be regarded in lands of any *other* deſcription.—The learned in the law allege that the utmoſt extent of tribute is *one half of the actual product*, nor is it allowable to exact more; but the taking of a *half* is no more than *ſtrict juſtice*, and is not tyrannical, becauſe, as it is lawful to take the *whole* of the *perſons* and *property* of infidels, and to diſtribute them among the *Muſſulmans*, it follows that taking half their incomes is lawful *a fortiori*.—By the term *gardens* [*Booſtan*] is here underſtood grounds ſurrounded by a *fence*, and planted with fruit-trees, either *date*-trees or others. The compiler of the *Hedáya* remarks that in our country * tribute is levied upon all lands in *caſh*: but this is immaterial, becauſe the amount of the tribute is due, according to ability, either in *caſh*, or in the actual product of the land. If the land be incapable of yielding the eſtabliſhed tribute, the *Imâm* muſt make an abatement; and it is lawful ſo to do, where the product falls ſhort. According to *Mohammed* it is alſo lawful to exact *beyond* the eſtabliſhed tribute, where the product happens to exceed, judging of a caſe of *increaſe* from a caſe of *deficiency*: but, according to *Aboo Yooſaf*, it is not lawful to take more than the *eſtabliſhed* tribute: and this is approved; becauſe *Omar* never exacted any thing beyond what was eſtabliſhed, upon being informed of any increaſe of produce: if, however, any thing be *voluntarily* given in addition to what is eſtabliſhed, it may be accepted.

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* (According to the *Lexicons*,) *as much land as will produce about ſeven hundred and ſixty-eight pounds weight of corn*: its extent is afterwards particularly deſcribed; from which it would appear that this calculation muſt be erroneous.

† About twenty-one pounds ſterling; alſo a weight of about ſeven pounds.

‡ A ſmall ſilver coin from two-pence to eight-pence ſterling, but now of uncertain value.

§ From ten-pence to two ſhillings and ſixpence ſterling. || From one ſhilling and eight-pence to five ſhillings ſterling. ** A ſquare *yard* or *cubit*. †† *Kabza*; a *ſpan*.

Tribute may be occaſionally *abated*,
be
a-

Failure of the crop cauſes a remiſſion of tribute.

If tillage be rendered impracticable in tribute lands, from floods or draughts,—or if, after ſowing, the crop ſhould fail from any other unavoidable cauſe, ſuch as *locuſts*, or *blights*, or *violent heats*, in any of theſe caſes tribute is not due from it;—becauſe the landholder is unable at all to cultivate the ſoil, either in a caſe of *inundation*, or of a *ſcarcity* of water; and in a caſe of failure of the crop from other accidents (of *locuſts*, *blights*, and ſo forth,) he is debarred from the advantage of tillage *for a part of the year*; in both caſes, therefore, there is no increaſe (in the degree which conſtitutes *ability*) for the *whole year*; and it is conditional to the exaction of the tribute that this ability be found for the whole year, in the ſame manner as increaſe to the like degree *for the whole year* is conditional to the payment of *Zakât*.

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* Meaning the northern *Perſia*.

IF a landholder, where no obſtruction to cultivation exiſts, keep *tribute* lands untilled, and thus reap nothing from them, tribute is nevertheleſs due upon them. The two *Elders* allege that if the landholder, being enabled to ſow grain of the *firſt* quality, ſow grain of a *ſecond* quality, he is accountable for the *higheſt* degree of tribute: for inſtance, if his ground be capable of producing *ſaffron*, and he ſhould therein ſow *lentils*, in this caſe tribute as for *ſaffron* ground is due from him:—decrees, however, muſt not be paſſed to this effect*, leſt tyrants might be encouraged to oppreſs the landholder.

Tribute due on lands untilled.

IF any perſon ſubject to tribute become a *Muſſulman*, tribute continues to be impoſed upon him after his converſion to the faith, in the ſame manner as before; becauſe tribute bears not only the ſenſe of a *penal impoſt levied upon infidels*, but alſo, of a *proviſion for the expences of the ſtate*; and in this ſenſe the continuance of it upon a *Muſſulman* is practicable.

A tributary liable to tribute after converſion to the faith.

IT is lawful for a *Muſſulman* to purchaſe tribute-lands of a *Zimmee*; after which tribute is to be taken from him (the *Muſſulman*,) as it is ſaid, in the *Nakl-Saheeh*, that the companions purchaſed tribute-

Tribute-land purchaſed by a *Muſſulman* continues ſubject to tribute.

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* That is, *compulſion* muſt not be uſed to exact the tribute at this rate.

tribute-land, and paid the tribute upon it, which demonſtrates that it is lawful for a *Muſſulman* ſo to do, and not any abomination.

is not due from *tribute*-land.

TITHE is not due from the product of *tribute*-lands. *Shafeï* affirms that *tithe* and *tribute* are both due from it, as they are two ſeparate claims, due from two diſtinct ſubjects, and for two different reaſons. The *ſubjects* are different, as *tribute* is a debt upon the proprietor's perſon, and *tithe* is due from the *actual product* of the lands: and the *reaſons* for their being due are different, as the reaſon for *tribute* being due is, land being productive to the amount of *ability*, and the reaſon for *tithe* being due is, land being productive in *fact*. In the ſame manner, the objects of diſburſement of each are alſo different, as *tribute* is expended upon the *troops*, and *tithe* upon the *poor*. The exaction of the *one*, therefore, does not forbid the exaction of the *other*.—The arguments of our doctors upon this point are threefold.—FIRST, the prophet has ſaid "TITHE *and* TRIBUTE *are* "*not to be united in the land of Muſſulmans*:" SECONDLY, no inſtance has ever occurred of any magiſtrate attempting to unite *tithe* with *tribute*:—THIRDLY, *tribute* is due upon ſuch lands as have been conquered by force of arms, and *tithe*, upon lands the proprietors of which have voluntarily embraced the faith,—and theſe two deſcriptions cannot both apply to one ſoil; but the *reaſon* for *tithe* and *tribute* is *one*, namely, *a productive ſoil*;—whence it is that *tithe* and *tribute* have a reference to *land*, and it is commonly ſaid, "*the* TITHE *of* "*land*," and "*the* TRIBUTE *of land*," which ſhews that the reaſon for both is *a productive ſoil*,—in *tithe*, produce *actually*, and in *tribute*, produce to the degree of *ability*.—A ſimilar difference of opinion obtained concerning the uniting of *Zakât* with *tithe* or *tribute*: that is, if a perſon purchaſe *tithe*-land or *tribute*-land, in the way of merchandiſe, our doctors hold that nothing but *tithe* or *tribute* is due, and that *Zakât* is *not* due; whereas *Shafeï* maintains that together with *tithe* or *tribute Zakât* is alſo due, on account of the *traffic*;—and the ſame is the opinion of *Mohammed*.

Zakât is not due from *tithe* or *tribute*-land.

If *tribute*-land ſhould yield *two* crops in *one* year, from a double cultivation, yet tribute is not to be levied a *ſecond* time on account of the ſecond crop, as *Omar* did not levy a *ſecond* tribute, for a *ſecond* crop. It is otherwiſe with *tithe*, as that is repeatedly levied on repeated produce, in *tithe*-land, becauſe if *tithe* were not repeatedly levied on account of a repeated crop, the collection of it would be uncertain.

A ſecond crop occaſions a ſecond ment of but not

CHAP. VIII.

Of *Jizyat*, or *Capitation-Tax*.

Jizyat, or *capitation-tax*, is of two kinds. The firſt ſpecies is that which is eſtabliſhed voluntarily, and by compoſition,—the rate of which is ſuch as may be agreed upon by both parties,—becauſe the prophet entered into a compoſition with the tribe of *Binney Bijrân*, for twelve hundred pieces of cloth, and not more,—and alſo, becauſe the fixing of tribute in this mode is a mutual act of both parties, and therefore it is not lawful to ſwerve from what has been ſo mutually agreed upon. The *ſecond* ſpecies is that which the *Imâm* himſelf impoſes, where he conquers infidels, and then confirms them in their poſſeſſions, the common rate of which is fixed by his impoſing upon every avowedly *rich* perſon a tax of forty-eight *dirms per annum*, or four *dirms per* month;—and upon every perſon in *middling* circumſtances, twenty-four *dirms per annum*, or two *dirms per* month;—and upon the labouring poor twelve *dirms per annum*, or one *dirm per* month. This is according to our doctors. *Shafeï* maintains that he ſhould exact from each ſane and adult perſon, one *deenar*, or ſomething to that amount;—and the poor and wealthy are on an equal footing in this point; becauſe the prophet ſaid to *Mâaz*, "*Take from every male and* "*female adult one* DEENAR, *or cloth to that value*;"—from which it

Capitation-tax is of two kinds, *voluntary*, (which is eſtabliſhed by compoſition,)

and

Rates of im-

; that there is no manner of difference between the *rich* and the as the prophet ſpoke *generally*, without making any diſtinction: moreover, capitation-tax is due only in lieu of deſtruction *, (whence it is that it is not due from perſons the deſtruction of whom on account of infidelity is illegal, namely *women* and *children*,) and in this ſenſe it applies equally to the *rich* and the *poor*.—The arguments of our doctors upon this head are twofold.—FIRST, their doctrine is adopted from *Omar*, *Othman*, and *Ali*, with whom all the companions agreed upon this point: SECONDLY, capitation-tax ſerves as an *aid* to the troops, and therefore differs in its rate, according to the difference of men's circumſtances, in the ſame manner as tribute upon land. The ground of this is that capitation-tax is due in lieu of aſſiſtance, with perſon and property †; but as property is different with reſpect to being *more* or *leſs*, ſo in the ſame manner that is different, which is a ſubſtitute for it.—With reſpect to the tradition adduced by *Shafeï*, we are only to underſtand from it that the taking of *deenars*, and ſo forth, from the tribe to whom he alluded was in the way of a *compoſition*, in which there is no difference between the *poor* and the *rich*, as is further proved by the term *female adults*, in the ſaying referred to, ſince capitation-tax is not incumbent upon *women*. It is to be obſerved that in the exaction of capitation-tax from the labouring poor, it is a condition that the perſon upon whom it is levied be in a ſtate of health for the greater part of the year.

CAPITATION-TAX is to be impoſed upon *Kitâbees*, becauſe this is mentioned in the *Koran*: and it is in the ſame manner to be impoſed upon *Majooſees*, as the prophet impoſed capitation-tax upon *ees*.—Capitation-tax is alſo to be impoſed upon the idolaters of [*Perſia.*] This is contrary to the opinion of *Shafeï*, for he

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That is to ſay, is impoſed as a return from the mercy and forbearance ſhewn by the and as a ſubſtitute for that *deſtruction* which is due upon infidels.

† Namely, that aſſiſtance which every ſubject of the *Muſſulman* government is by the law enjoined to afford towards carrying on the injoined war with infidels.

argues that deſtruction is incurred by *all* infidels; but the legality of abſtaining from it, in conſideration of a capitation-tax, with reſpect to *Kitábees*, is known from the word of the KORAN, and with reſpect to *Majooſees*, from the traditions; any others, therefore, than thoſe, (namely, *idolaters*,) remain ſubject to the original penalty, which is *deſtruction*. The argument of our doctors is that as it is lawful to make ſlaves of the idolaters of *Ajim*, it follows that it is alſo lawful to impoſe capitation-tax upon them; becauſe, in the ſame manner as, by reducing them to ſlavery, they are deprived of power over their own perſons, ſo alſo, they are deprived of power over their own perſons by the impoſition of capitation-tax, ſince they muſt in this caſe work, and pay the *Muſſulmans* the produce of their labour, and their ſubſiſtence is furniſhed from their labour.

The inhabitants of a conquered country are the property of the ſtate.

IF a *Muſſulman* army ſubdue an infidel territory before any capitation-tax be eſtabliſhed, the inhabitants, together with their wives and children, are all *plunder*, and the property of the ſtate, as it is lawful to reduce to ſlavery all *infidels*, whether they be *Kitábees*, *Ma-* or *idolaters*.

No compoſition to be accepted from *Arabian* idolaters,

CAPITATION-TAX is not impoſed upon the idolaters of *Arabia*, becauſe their infidelity is particularly atrocious, ſince the prophet was ſent among them, and manifeſted himſelf in the midſt of them, and the KORAN was delivered down in their language; wherefore their depravity is moſt evident. In the ſame manner, capitation-tax is not impoſed upon apoſtates, as their infidelity is alſo of an atrocious nature, becauſe they have apoſtatiſed and become infidels after having been led into the way of the faith, and made acquainted with its excellence.—From neither of theſe, therefore, is any thing to be accepted, but they muſt embrace the faith, or be put to death. *Shafei* holds that it is lawful to make ſlaves of the idolaters of *Arabia*:—the reply to him is contained in the arguments of our doctors as before recited.

IF

and upon being conquered they become public property.

If a *Muſſulman* army conquer the idolaters of *Arabia*, or apoſtates*, their wives and children are plunder, that is, become the property of the ſtate; becauſe *Sideek* made ſlaves of the women and children of the *Binney-Haneeſa* tribe, when they apoſtatiſed, and divided thoſe ſlaves among the troops, and ſlew ſuch of the men as did not return to the faith, for the reaſons before aſſigned.

Capitation-tax not due from *wo*, *children*,

CAPITATION-TAX is not due from *women* or *children*; becauſe it is due either in return for a remiſſion of deſtruction, or in lieu of aſſiſtance in the wars of the faith, and women and children are not liable to be ſlain,—nor do they engage in war, as they are incapable thereof. In the ſame manner, capitation-tax is not due from the *maimed*, the *blind*, the *paralytic*, or the *aged*, becauſe theſe are incapable of engaging in war. It is recorded from *Aboo Yooſaf* that capitation-tax is impoſed upon the *aged*, where they are poſſeſſed of property, becauſe an aged perſon, of ſound underſtanding, is liable to be ſlain.

or *paupers*;

CAPITATION-TAX is not due from ſuch poor as do no w

Shafeï maintains that capitation-tax is due from them, becauſe of the tradition of *Maáz*, (before recited) which is *generally* expreſſed. The arguments of our doctors are twofold.—FIRST, *Othman* refrained from impoſing capitation-tax upon the poor of this deſcription,—and this, in the preſence of other companions:—SECONDLY, as tribute on land is not impoſed upon ground incapable of bearing it, ſo in like manner capitation-tax is not impoſed upon one who is unable to pay it: and with reſpect to the tradition of *Máaz*, although it be *generally* expreſſed, yet it relates to the *labouring* poor only.

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* The term *apoſtate* applies not only to *individuals*, but alſo to *whole tribes*, who, after embracing the faith, renounced it, and returned to their former way of worſhip.

y, *Fakeers*, or others who ſubſiſt by *begging*.

CAPITATION-TAX is not impoſed upon *ſlaves*, *Mokâtibs*, *Modabbirs*, or *Am-Walids*, becauſe *capitation-tax* is a ſubſtitute for deſtruction, with reſpect to *them*, and, with reſpect to *us*, it is a ſubſtitute for *aid* [in the wars of the faith;] now in conformity with the *firſt* of theſe, it would follow that capitation-tax *is* due from them, and, in conformity with the *ſecond*, that it is *not* due; a doubt therefore ariſes with reſpect to its being due; and as this is the caſe, it is determined not to be incumbent upon them: neither is it incumbent upon their owner to pay capitation-tax for them, becauſe he himſelf by their means pays an increaſed capitation-tax, as he through them becomes *rich*, or obtains a *mediocrity* of circumſtances; and in either caſe he pays capitation-tax in a degree ſuperior to the *labouring poor*.

nor is it impoſed upon *ſlaves* of any deſcription;

CAPITATION-TAX is not impoſed upon *Râhibs*, (that is, Chriſtian or Pagan *monks* and *hermits*, who do not mix with the reſt of mankind:)—the ſame is mention'ed by *Kadooree*. *Mohammed*, in the *Jama-Sagheer*, reports from *Haneefa* that capitation-tax may be impoſed upon thoſe, where they are capable of labour, (and ſuch is the opinion of *Aboo Yooſaf*;) becauſe where, being capable of labour, they refrain from it, they waſte their ability; capitation-tax, therefore, is due from them, in the ſame manner as tribute from the landholder, where he (being able) ſuffers his land to remain untilled.—The reaſon for what is related by *Kadooree* is that a monk is not to be deſtroyed where he does not mix with mankind; and capitation-tax, with reſpect to them, would be for the purpoſe of warding off deſtruction.

nor upon *monks* or *hermits*.

IF a perſon become a *Muſſulman*, who is indebted for any arrear of capitation-tax, ſuch arrear is remitted: and in the ſame manner, the arrear of capitation-tax due from a *Zimmee* is remitted upon his dying in a ſtate of infidelity. *Shafeï* holds that the tax is not remitted in either caſe; becauſe it was due either in return for protection to the perſon, or in return for permiſſion to reſide in the *Muſſulman* territory,

Arrear of capitation-tax is remitted, upon the ſubject's deceaſe, or converſion to the faith.

territory; and the *Zimmee* or convert has continued under protection, and reſided in the *Muſſulman* territory: the return from him, therefore, is not to be remitted in conſequence of the ſupervenient circumſtance of death, or converſion to the faith; in the ſame manner, as in a caſe of *hire*, or of compoſition for blood;—in other words, if capitation-tax be a return for *reſidence*, it comes under the conſtruction *hire*, and is not remitted in conſequence of *death*, or converſion to the faith, in the ſame manner as if a *Zimmee* were to hire a houſe and reſide therein for the period agreed upon, and then die, or embrace the faith, in which caſe the rent of the houſe does not ceaſe; and ſo likewiſe with reſpect to capitation-tax:—or, if capitation-tax be a return for *protection to the perſon*, it comes under the conſtruction of a compoſition for blood, and is not remitted in conſequence of *death* or converſion to the faith, in the ſame manner as if a *Zimmee* were wilfully to kill a perſon, and afterwards enter into a compoſition for the murder with the friends of the deceaſed, for a certain conſideration, and then become a *Muſſulman*, or die, in which caſe the conſideration is not remitted from him;—and ſo likewiſe capitation-tax, (which is the conſideration for protection to his perſon,) is not remitted. The arguments of our doctors upon this point are threefold.—FIRST, the prophet has declared that "*capitation-tax is not incumbent upon Muſſulmans*:"—SECONDLY, capitation-tax is a ſpecies of *puniſhment*, inflicted upon infidels on account of their infidelity, whence it is termed *Jizyat*, which is derived from *Jizya*, meaning *retribution*; now the *temporal* puniſhment of infidelity is remitted in conſequence of converſion to the faith; and after death it cannot be inflicted, becauſe temporal puniſhments are inſtituted ſolely for the purpoſe of removing evil, which is removed by either death or *Iſlâm*:—THIRDLY, capitation-tax is a ſubſtitute for aid to the *Muſſulmans*, and as the infidel in queſtion, upon embracing the faith, becomes enabled to aid them in his own perſon, capitation-tax conſequently drops upon his *Iſlâm*.—With reſpect to the argument adduced by *Shafeï*, we reply that capitation-tax is neither a conſideration for *protection to the perſon*, nor for *reſidence*, becauſe protection to the perſon is eſtabliſhed in virtue of humanity, and a *Zimmee* reſides, in the *Muſſulman* territory, within his own dwelling; wherefore the caſe does not admit that a conſideration, for protection to his perſon, or for reſidence, ſhould be exacted from him.

In a caſe of arrear for *two* years, *one*

If a *Zimmee* owe capitation-tax for *two* years, it is compounded,—that is, the tax for *one* year only is exacted of him:—and it is recorded, in the *Jama-Sagheer*, that if capitation-tax be not exacted of a *Zimmee* until ſuch time as the year has elapſed, and another year arrived, the tax for the paſt year cannot be levied. This is the doctrine of *Haneefa*. The two diſciples maintain that the tax for the paſt year may be levied. If, however, a *Zimmee* were to die near the cloſe of the year, in this caſe the tax for that year cannot be exacted, according to all our doctors: and ſo likewiſe, if he die in the *middle* of the year, (which inſtance has been already treated of.) Some aſſert that the above difference of opinion obtains alſo with reſpect to tribute upon land: whilſt others maintain that there is no difference of opinion whatever reſpecting it, but that it is not compounded, according to all our doctors.—The argument of the two diſciples (where they diſſent) is that capitation-tax is a *conſideration*, (as was before ſaid,) and if the conſiderations be numerous, and the exaction practicable, they are all to be exacted; and in the caſe in queſtion the exaction of capitation-tax for the two years is practicable: contrary to where the *Zimmee* becomes a *Muſſulman*, for in this caſe the exaction is impracticable.—The arguments of *Haneefa* upon this point are twofold. FIRST, capitation-tax is a ſort of *puniſhment* inflicted upon infidels for their obſtinacy in infidelity, (as was before ſtated;) whence it is that it cannot be accepted of the infidel if he ſend it by the hands of a meſſenger, but muſt be exacted in a mortifying and humiliating manner, by the collector ſitting and receiving it from him in a *ſtanding* poſture: (according to one tradition, the collector is to ſeize him by the throat, and ſhake him, ſaying,

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bition againſt building churches and ſynagogues is confined to *cities*, and does not extend to *villages* and *hamlets*) relates ſolely to the villages of *Kooſa*; becauſe the greater part of the inhabitants of theſe villages are *Zimmees*, there being few *Muſſulmans* among them, wherefore the tokens of *Iſlâm* do not there appear: moreover, in the territory of *Arabia*, *Zimmees* are prohibited from conſtructing churches or ſynagogues either in *cities* or *villages*, becauſe the prophet has ſaid "*Two religions cannot be profeſſed together in the peninſula of Arabia.*"

in point of

It behoves the *Imâm* to make a diſtinction between *Muſſulmans* and *Zimmees* in point both of *dreſs* and of *equipage*. It is therefore not allowable for *Zimmees* to ride upon *horſes*, or to uſe armour, or to uſe the ſame ſaddles and wear the ſame garments or head-dreſſes as *Muſſulmans*; and it is written, in the *Jama Sagheer*, that *Zimmees* muſt be directed to wear the *Kiſteej openly*, on the outſide of their clothes; (the *Kiſteej* is a woollen cord or belt which *Zimmees* wear round their waiſts on the outſide of their garments;)—and alſo, that they muſt be directed, if they ride upon any animal, to provide themſelves a ſaddle like the panniers of an aſs. The reaſon for this diſtinction in point of clothing and ſo forth, and the direction to wear the *Kiſteej* openly is that *Muſſulmans* are to be held in honour; contrary to *Zimmees*, who are not to be held in honour (whence it is that they are not ſaluted *firſt*;) and if there were no outward ſigns to diſtinguiſh *Muſſulmans* from *Zimmees*, theſe might be treated with the ſame reſpect, which is not allowed. It is to be obſerved that the inſignia incumbent upon them to wear is a *woollen* rope or cord tied round the waiſt, and not a *ſilken belt*.

Their wives muſt not aſſociate with

It is requiſite that the wives of *Zimmees* be kept ſeparate from the wives of *Muſſulmans*, both in the public roads, and alſo in the *baths*: and it is alſo requiſite that a mark be ſet upon their dwellings, in order that beggars who come to their doors may not pray for them. The learned have alſo remarked that it is fit that *Zimmees* be not permitted

mitted to ride at all, except in caſes of *abſolute neceſſity*; and if a *Zimmee* be thus, of neceſſity, allowed to ride, he muſt alight wherever he ſees any *Muſſulmans* aſſembled; and if there be a neceſſity for him to uſe a ſaddle, it muſt be made in the manner of the panniers of an *aſs*. *Zimmees* of the higher orders muſt alſo be prohibited from wearing rich garments.

If a *Zimmee* refuſe to pay capitation-tax, or murder a *Muſſulman*, or blaſpheme the prophet, or commit whoredom with a *Muſſlima*, yet his contract of ſubjection is not diſſolved; becauſe the thing in virtue of which the deſtruction of *Zimmees* is ſuſpended is the *ſubmitting* to capitation-tax, not the actual *payment* thereof; and the *ſubmiſſion* to it ſtill continues. *Shafeï* has ſaid that the contract of ſubjection is diſſolved by a *Zimmee*'s blaſpheming the prophet; becauſe if he were a believer, by ſuch blaſphemy his faith would be broken*; and hence, in the ſame manner, his protection is thereby broken, ſince the contract of ſubjection is merely a ſubſtitute for *belief*. The argument of our doctors is that the blaſphemy in queſtion is merely an act of *infidelity* proceeding from an infidel; and as his infidelity was no obſtruction to the contract of ſubjection at the time of making it, this ſupervenient act of infidelity does not cancel it.

contract of ſubjection is not diſſolved by his commiſſion of a crime;

A contract of ſubjection is diſſolved only by *Zimmees* abſconding to the territory of the infidels, or making an attack upon the *Muſſulmans*; in either of which caſes the contract ceaſes to exiſt; becauſe the advantage propoſed from it is the removal of the evils of *war* and *bloodſhed*; and this advantage ceaſes to exiſt upon their engaging in hoſtilities.

infidels, or attack the *Muſ-*

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* That is, he would become a virtual *apoſtate*, and forfeit the protection and privileges of a *believer*. The conſequence attending a breach of the contract of ſubjection is men- a little further on.

A Zimmee,

when he becomes liable to the ſame

A Zimmee, upon breaking his contract of

the ſame predicament with an *apoſtate*,—that is, he is condemned to death upon abſconding to the territory of the infidels, in the ſame manner as holds in the rule with reſpect to apoſtates. The rule alſo with reſpect to ſuch property as he may carry off along with him into the ſaid territory, is the ſame as with reſpect to the property of an apoſtate;—that is, if the *Muſſulmans* afterwards conquer that territory, the property aforeſaid is forfeited to the ſtate, in the ſame manner as the property of an apoſtate:—but if the *Zimmee* be made captive, he is a *ſlave:* contrary to the caſe of an apoſtate, who, if he repent not, is put to death.

SECTION.

of the *Togblib* tribe ſubject to double *Za*-

Of *Zakát* twice as much is levied upon the property of Chriſtians of the *Binney Togblib* tribe as is levied upon the property of *Muſſulmans* becauſe *Omar* made peace with them upon this condition, and this in the preſence of the other companions, none of whom diſputed it:—and in the ſame manner, twice as much is taken from the *women* of that tribe as from the *Muſſulmans*, becauſe the above peace eſtabliſhed the taking of double *Zakât*, and *Zākát* is incumbent upon women; double *Zakât*, therefore, is exacted of the *women* of that tribe,—but *not* of the *children*, becauſe *Zakât* is not incumbent upon children. *Ziffer* ſays that the *women* of that tribe are alſo exempted from this, (and ſuch is likewiſe the opinion of *Shafeï*,) becauſe the double *Zakât* in queſtion is actually *capitation-tax*, as *Omar* declared to them "*This is* Jizyat, *and name it which ever ye pleaſe*, Jizyat, *or* Zakât;" (whence it is that whatever is exacted from them is expended upon the ſame objects of expenditure as capitation-tax:)—it is therefore evident that this is *capitation-tax*, and women are not ſubject to it.—

The argument of our doctors is that the thing in queſtion has been made obligatory by the terms of a peace, and women are capable of being ſubject to ſuch obligations:—and with reſpect to what is urged by *Ziffer* and *Shafeï*, that "whatever is exacted of them is expended "upon the ſame objects of expenditure as *capitation-tax*," it may be replied that this is *not* applied to the purpoſes of the *Muſſulmans*, as the property which is applied to the purpoſes of the *Muſſulmans* is the property in the public treaſury, to which the purpoſes of the *Muſſulmans* is the object of expenditure, and this object of expenditure is not reſtricted to *capitation-tax* alone, ſo as to afford an argument of the thing in queſtion being *capitation-tax*:—in ſhort, the impoſt in queſtion is not *capitation-tax*, and hence the conditions of capitation-tax are not regarded in the exaction of it.

Rule of capitation-tax, with reſpect to *Toghlibees*, and *Koreiſhees*.

CAPITATION-TAX is impoſed upon the freedmen[*] of the *Binney-Toghlib* tribe, and alſo tribute upon their lands, although capitation-tax and tribute be not exacted from their maſters; in the ſame manner as theſe impoſts are levied upon the freedmen of the *Koreiſh* tribe, although a *Koreiſh* be not ſubject to them. *Ziffer* ſays that there is levied upon their property a twofold proportion of what is levied upon the property of *Muſſulmans*, in the ſame manner as a twofold proportion is levied upon the tribe of *Binney-Toghlib*;—becauſe the prophet has ſaid "*The freedmen of any tribe are of that tribe*;" whence it is that it is unlawful to beſtow alms upon the *freedmen* of the tribe of *Haſhim*, in the ſame manner as it is unlawful to beſtow it upon the *freemen* of that tribe[†]. Our doctors, on the other hand, argue that the exaction of a twofold proportion from the *Binney-Toghlib* tribe, by the terms of a peace, is an act of favour with reſpect to them; becauſe that is not taken from *them* in the way that capitation-tax is taken from *Zimmees*, with humiliation and degradation; and a freedman is not connected with his maſter in any thing which is a favour

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meaning *emancipated ſlaves.*

[†] Vol. I. p. 58.

to the maſter, whence it is that capitation-tax is impoſed upon the freedman of a *Muſſulman*, who is a Chriſtian.—It is otherwiſe with reſpect to the prohibition of *alms*, becauſe prohibition is eſtabliſhed by *doubt*, whence it is that the freedman of a *Haſhimee* is connected with the *Haſhimee*, with reſpect to the prohibition of alms.

Objection.—It would hence follow that alms are unlawful to the freedman of a rich perſon, in the ſame manner as they are unlawful to the rich perſon himſelf; whereas the caſe is otherwiſe.

Reply.—Alms are not unlawful to the freedman of a rich perſon, becauſe the rich perſon himſelf may be one to whom alms are lawful, but prohibited by *wealth*, which cauſe of prohibition does not exiſt with reſpect to his freedman:—a *Haſhimee*, on the contrary, is utterly incapable of receiving alms, as he is, by the dignity and ſuperiority of his rank, precluded from accepting of them; and hence his freedman is connected with him as far as reſpects the illegality of alms.

tation-tax, and public preſents, to be expended in

charges.

Tribute, and all other exactions from the property of the *Binney-Toghlib* tribe, as well as the preſents ſent by foreigners to the *Imâm*, together with capitation-tax, is expended upon the purpoſes *Muſſulmans*, ſuch as the conſtruction of fortreſſes upon the *Muſſulman* frontiers, building of bridges, and ſo forth.—Out of theſe, alſo, a ſufficient allowance is to be paid to the *Muſſulman* magiſtrates, public officers, and learned men.—Subſiſtence is alſo paid out of this property to the warriors, and their families; becauſe the acquiſitions in queſtion are the property of the public treaſury, as being obtained by the *Muſſulmans* without *fighting*; and the property in the public treaſury is reſerved for the purpoſes of the *Muſſulmans* and of the warriors in their ſervice;—for the maintenance of a family reſts upon the head of that family, wherefore if he do not receive what may ſuffice for their ſupport, he will be under a continual neceſſity of ſeeking a ſubſiſtence for them, and conſequently, by a variety of engagements, will be occaſionally diſabled from ſervice.

IF any warrior, or other perſon, die in the middle of the year, having a ſubſiſtence appointed to him out of the public treaſury, his heirs are not entitled to any of the pay ſo appointed for him, becauſe this pay is a ſpecies of *gratuity*, and not a *debt*, (whence it is termed *Atta**,) and therefore does not become his property until he has obtained poſſeſſion of it, and ceaſes upon his deceaſe, and conſequently is not an inheritance. If, however, a perſon die towards the *end* of the year, it is laudable to give his pay to his relations. (*Atta* is the appointed allowance entered in the books of the *Sultan*, for ſoldiers, and for the miniſters of religion, who are, in the preſent times, *Kâzees*, *Mooftees*, and *Doctors*†. In the beginning of *Iſlâm*, *Atta* was appointed for any perſons of diſtinction, ſuch as the wives of the faithful, and the families of thoſe who were perſecuted.)

Arrears of [illegible] whom are due.

CHAP.

Of the Laws concerning *Apoſtates*.

WHEN a *Muſſulman* apoſtatizes from the faith, an expoſition thereof is to be laid before him, in ſuch a manner that if his apoſtacy ſhould have ariſen from any religious doubts or ſcruples, thoſe may be removed. The reaſon for laying an expoſition of the faith before him is that it is poſſible ſome *doubts* or *errors* may have ariſen in his mind, which may be removed by ſuch expoſition; and as there are only two modes of repelling the ſin of apoſtacy, namely, *deſtruction* or *Iſlâm*, and *Iſlâm* is preferable to deſtruction, the evil is rather to be removed by means of an expoſition of the faith;—but yet this expoſition of the

An expoſition of the faith is to be laid before an apoſtate;

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* *Angelicé*, BOUNTY.

† *Arab. Moodris*: a title for any *learned* perſon.

faith is not *incumbent**, (according to what the learned have remarked upon this head,) ſince a call to the faith has already reached the apoſtate.

is put to death;

apoſtate is to be impriſoned for three days, within which time if he return to the faith, it is well: but if not, he muſt be ſlain.—It is recorded in the *Jama Sagheer* that "an expoſition of the faith is "to be laid before an apoſtate, and if he refuſe the faith, he muſt be "ſlain:"—and with reſpect to what is above ſtated, that "he is to "be impriſoned for three days," it only implies that if he require a delay, three days may be granted him, as ſuch is the term generally admitted and allowed for the purpoſe of conſideration. It is recorded from *Haneefa* and *Aboo Yooſaf* that the granting of a delay of three days is laudable, whether the apoſtate require it or not: and it is recorded from *Shafeï* that it is *incumbent* on the *Imâm* to delay for three days, and that it is not lawful for him to put the apoſtate to death before the lapſe of that time; ſince it is moſt probable that a *Muſſulman* will not apoſtatiſe but from ſome doubt or error ariſing in his mind; wherefore ſome time is neceſſary for conſideration; and this is fixed at three days. The arguments of our doctors upon this point are twofold.—FIRST, GOD ſays, in the *Korân*, "SLAY THE UNBELIEVERS," without any reſerve of a delay of three days being granted to them; and the prophet has alſo ſaid "*Slay the man who* "*changes his religion*," without mentioning any thing concerning a delay: SECONDLY, an apoſtate is an *infidel enemy*, who has received a call to the faith, wherefore he may be ſlain upon the inſtant, without any delay. An apoſtate is termed on this occaſion an *infidel enemy*, becauſe he is undoubtedly ſuch; and he is not *protected*, ſince he has not *required* a protection; neither is he a *Zimmee*, becauſe capitation-tax has not been accepted from him; hence it is proved that he is an *infidel enemy* *. It is to be obſerved that, in theſe rules, there is no difference made between an apoſtate who is a *freeman*, and one who is a *ſlave*, as the arguments upon which they are eſtabliſhed apply equally to both deſcriptions.

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* That is, it is lawful to kill an apoſtate without making any attempt to recover him from his apoſtacy.

whether he be a *freemen* or a *ſlave*.

His repentance is eſtabliſhed by a ſimple recantation.

THE repentance of an apoſtate is ſufficiently manifeſted in his formally renouncing all religions except the religion of *Iſlâm*, becauſe apoſtates are not a *ſect*: or if he formally renounce the religion which he embraced upon his apoſtacy, it ſuffices, ſince thus the end is obtained.

Nothing is incurred by the premature

IF any perſon kill an apoſtate, before an expoſition of the faith has been laid open to him, it is abominable, (that is, it is laudable to let him continue unmoleſted.) Nothing however, is incurred by the ſlayer; becauſe the infidelity of an alien renders the killing of him admiſſible; and an *expoſition* of the faith, after a *call* to the faith, is not neceſſary.

A *female* apoſtate is impriſoned until ſhe return to the faith.

IF a *Muſſulman* woman become an apoſtate, ſhe is not put to death, but is impriſoned, until ſhe return to the faith. *Shafeï* maintains that ſhe is to be put to death; becauſe of the tradition before cited;—and alſo, becauſe, as men are put to death for apoſtacy ſolely for this reaſon, that it is a crime of great magnitude, and therefore requires that its puniſhment be proportionably ſevere, (namely, *death*,) ſo the apoſtacy of a woman being likewiſe (like that of man) a crime of great magnitude, it follows that *her* puniſhment ſhould be the ſame as that of a *man*. The arguments of our doctors upon this point are twofold.—FIRST, the prophet has forbidden the ſlaying of women, without making any diſtinction between thoſe who are *apoſtates*, and thoſe who are *original infidels*. SECONDLY, the original principle in the retribution of offences is to delay it to a future ſtate, (in other words, not to inflict puniſhment *here*, but to refer it to *hereafter*,) ſince if retribution were executed in this world, it would render defective the ſtate of *trial**, as men would avoid committing ſin from apprehenſion of puniſhment, and therefore would be in the ſtate of perſons acting under compulſion, and not of *free agents:* but in the caſe of apoſtacy of *men* the puniſhment is not deferred to a future ſtate, becauſe it is indiſpenſably requiſite to repel their preſent wickedneſs, (namely, their becoming enemies to the faith,) which wickedneſs cannot be conceived of *women*, who are, by natural weakneſs of frame, incapable thereof: contrary to *men*.—A female apoſtate, therefore, is the ſame as an original female infidel; and as the killing of the one is forbidden, ſo is the killing of the other alſo. She is however to be impriſoned, until ſhe return to the faith; becauſe, as ſhe refuſes the right of God after having acknowledged it, ſhe muſt be compelled, by means of impriſonment, to render God his right, in the ſame manner as ſhe would be impriſoned on account of the right of the individual. It is written in the *Jama Sagheer*,—"A female apoſtate "is to be *compelled* to return to the faith, whether ſhe be *free*, or a "*ſlave*."—The ſlave is to be compelled by her *maſter*:—ſhe is to be *compelled*, for the reaſons already recited; and this compulſion is to be executed by her *maſter*, becauſe in this a regard is had to the right both of God and of the maſter. It is elſewhere mentioned that a female apoſtate muſt be daily beaten with ſeverity until ſhe return to the faith.

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* *Arab. Hirbee*; a term which the tranſlator has generally rendered *alien*, and which applies to any infidel not being a ſubject of the *Muſſulman* government.

An apoſtate's right over his [illegible] nd not *deſtroyed* until his deceaſe.

An apoſtate's right over his property is diſſolved by his apoſtacy, [illegible] a *ſuſpended* diſſolution: if, therefore, he again become a *Muſſulman*, he again becomes endowed with a right over his property, in the ſame manner as before. Lawyers obſerve that this is an opinion of *Haneefa*. According to the two diſciples, his right over his property is not diſſolved, becauſe he is neceſſitous, and alſo liable to demands; and it is requiſite that ſuch a perſon's right over his property be not diſſolved, ſince a perſon not poſſeſſed of this right is incapable of anſwering ſuch demands as may be made upon him: his right over his property, therefore, endures until he be put to death, in the ſame manner as that of a perſon under a ſentence of *retaliation*, or of *lapidation*. The argument of *Haneefa* upon this head is that an apoſtate is an *infidel enemy**, and is in our hands until he be put to death. Now the killing of him is only lawful in conſequence of his ſhewing himſelf an *enemy*: and this circumſtance proves that his right over his property is deſtroyed; but yet, as his being invited back to the faith affords room to hope that he may again become a *Muſſulman*, it is for that reaſon ſaid that his right over his property is diſſolved by a *ſuſpended* diſſolution. If, therefore, he again become a *Muſſulman*, it is accounted the ſame as if he were always a *Muſſulman*, and he ſtands, (with reſpect to the *diſſolution of his right*,) as if he never had apoſtatiſed, that is, the apoſtacy which occaſioned a deſtruction of his right is in this caſe of no effect. If, however, he do not again become a *Muſſulman*, but die or be ſlain in his apoſtacy, or abſcond to a foreign country, and the *Kazee* iſſue a decree of expatriation † againſt him, his infidelity becomes then confirmed and eſtabliſhed, and the cauſe above-mentioned takes effect in the deſtruction of his right, and his right is deſtroyed accordingly.

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* Meaning that *probation* which is the chief deſign of the preſent ſtate of man.

Upon an apoſtate dying, his property acquired in apoſtacy becomes forfeited to the ſtate; and the

IF an apoſtate die or be ſlain in his apoſtacy, his property acquired during his profeſſion of the faith goes to his heirs who are *Muſſulmans*, and whatever he acquired during apoſtacy is public property of the community of *Muſſulmans*,—that is, it goes to the public treaſury.—This is according to *Haneefa*. The two diſciples allege that his to property of both deſcriptions goes to his heirs who are *Muſſulmans. Shafeï*, on the other hand, holds that they are both public property, becauſe he died in a ſtate of infidelity, and a *Muſſulman* cannot inherit of an infidel; and as he is an *infidel enemy*, his property is forfeited to the *public*,—that is, to the *ſtate*. The argument of the two diſciples is that what the apoſtate acquired during his profeſſion of the faith, and alſo, what he acquired during his apoſtacy, are both equally his property until his deceaſe, for the reaſon already mentioned: the *whole* of his property, therefore, devolves to his heirs in conſequence of his deceaſe, in virtue of their right of inheritance reſting upon a time when he was not an apoſtate; becauſe apoſtacy occaſions death, and hence it is placed in the ſame ſtate as if he had acquired the whole property during his profeſſion of the faith: and as his heirs are heirs to that property from the period of his profeſſion of the faith, it follows that a *Muſſulman* inherits of a *Muſſulman*, not that a *Muſſulman* inherits of an *infidel*.—The argument of *Haneefa* is that the ſucceſſion to inheritance, in ſuch a way that a *Muſſulman* inherits of a *Muſſulman*, is poſſible with reſpect to the property acquired during *Iſlâm*, as that property exiſted before apoſtacy, which was a ſpecies of civil death: but this ſucceſſion to inheritance is not in ſuch a way poſſible, with reſpect to the property acquired during apoſtacy, becauſe this property did not exiſt whilſt the perſon in queſtion profeſſed the faith; and the exiſtence of the property during his profeſſion of the faith is a condition of ſucceſſion to inheritance.—It is neceſſary to obſerve that no perſon can inherit of an apoſtate but one who was competent to inherit at the time of his apoſtacy, by being then *free* and a *Muſſulman*, and who continued of this deſcription till the time of the apoſtate's deceaſe or deſertion into a foreign ſtate. This is recorded from *Haneefa* by *Hooſn-Bin-Zeeyâd*, and proceeds upon the ground that in inheritance regard is had to *ſucceſſion*; and in ſucceſſion it is a condition that the ſucceſſor be firſt certified, and then his ſucceſſion declared; and it is requiſite that the qualities which entitle to inheritance exiſt in the ſucceſſor at the time of certifying his right to ſucceſſion,

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† Literally, "iſſue a decree *connecting him with a hoſtile country*." The term *expatriation* is adopted by the tranſlator, as the decree in queſtion does not amount to *baniſh-* but only to a ſuſpenſion of *civil life*.

who muſt have been qualified to

ſucceſſion, which are, his being a *Muſſulman* and *free*. It is alſo a requiſite that theſe qualities exiſt in him at the period of ſucceſſion; inſomuch that, if any of the apoſtate's relations were to become *Muſſulmans* upon his apoſtacy, or if a child be born to him begotten in his apoſtacy, they cannot (according to this doctrine) inherit of him. There is, however, *another* doctrine of *Haneefa* recorded upon this head, which is, that any perſon inherits of the apoſtate who was entitled to inherit of him at the time of his apoſtacy; and that the continuance till the time of his deceaſe of thoſe qualities which entitle to inheritance is unneceſſary;—according to which doctrine the right of the perſon entitled to inherit of the apoſtate at the time of his apoſtacy is not annulled by his deceaſe*, but *his* heir ſteps in as his ſubſtitute, becauſe apoſtacy is a ſpecies of death, and hence in eſtabliſhing the right to inheritance the *period of apoſtacy* is regarded. This is the ſubſtance of what is ſaid by *Aboo Yooſaf*.—A *third* doctrine is that regard is had to the *exiſtence* of the heir at the time of the apoſtate's death or deſertion into the enemy's country; and ſuch is the opinion of *Mohammed*, who has ſaid in the *Mabſoot* that this is the moſt approved doctrine, becauſe whatever occurs *poſterior* to the *exiſtence* of a cauſe, but *before* the *completion* thereof, ſtands in the ſame predicament with that which occurs *previous* to the exiſtence of the cauſe;—in the ſame manner as a child born of a purchaſed ſlave previous to the ſeizin of the purchaſer;—that is, a child born of a purchaſed female ſlave poſterior to the purchaſe, but previous to the ſeizin of the purchaſer, is conſidered as exiſting at the time of the contract of ſale, ſo far as to be a ſubject of the contract, and to have a part of the price ſet againſt it:—contrary to where it is born *ſubſequent* to ſeizin.—An heir, therefore, diſcovered *ſubſequent* to the apoſtacy, is in the ſame predicament with one who exiſted *previous* to the apoſtacy, and at the time of the apoſtate's profeſſing the faith; and conſequently inherits of the apoſtate.

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* That is, ſuppoſing him to die in the interim between the date of the apoſtacy and the death of the apoſtate.

The *Muſſulman* wife of [illegible] ein- herits of him.

The wife of an apoſtate, being a *Muſſlimá*, inherits of him, where he die or be ſlain during her *edit* from *ſeparation* in conſequence of his [illegible] becauſe the huſband, in this caſe, becomes an *evader*[*], although he be not *ſick* at the time of his apoſtacy.

The *whole* of a female apoſtate's pro- to

The property left by a female apoſtate goes to her heirs, whether it have been acquired during her profeſſion of the faith, or in her apoſtacy; becauſe the woman's perſon is inviolable[†]; and the protection of her blood is not deſtroyed by her apoſtacy; (whence it is that ſhe is not put to death;) and as the protection of her blood ſtill holds good, and her perſon continues inviolable, it follows that the protection of her *property* alſo is not deſtroyed, (ſince *property* is a *dependant* of the perſon;)—and hence her property does not become forfeited to the *ſtate*.—It is otherwiſe in the caſe of a *male* apoſtate; becauſe he (according to the doctrine of *Haneefa*) has made a diſtinction between his property acquired during *Iſlâm*, and his property acquired during *apoſtacy*,—as a *male* apoſtate is liable to be put to death.

an of his apoſtate wife, unleſs ſhe

The huſband of a female apoſtate (being a *Muſſulman*) inherits of her, provided ſhe have apoſtatiſed during ſickneſs, with a view to invalidate her huſband's right:—but if ſhe have apoſtatiſed whilſt in *health*, her huſband cannot inherit of her, becauſe a female apoſtate is not put to death for her apoſtacy, and hence her huſband's right does not, in conſequence of her apoſtacy, become connected with her property:—contrary to the caſe of a *male* apoſtate.

ate be- ing expatri- *Am-*

If an apoſtate go off to a foreign country, and the magiſtrate iſſue a decree uniting him to the infidels, his *Moodábbirs* and *Am-Walids* are free, and his deferred debts become undeferred, (that is, the payment and pertyacquired in *Iſlamiſm* goes to his heirs; and all his debts become immediately payable:

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[*] For a full explanation of this term, ſee Vol. I. p. 283.

[†] *Arab. Maſoom-al-dam:* that is, *of protected blood*; meaning, not liable to be ſlain (on account of her *apoſtacy*.)

ment of them becomes immediately due,)—and his property acquired during his profeſſion of the faith goes to his *Muſſulman* heirs. *Shafeï* maintains that his property continues in ſuſpenſe; becauſe his expatriation is merely a ſpecies of *abſence*, and therefore operates in the ſame manner as his abſence within the *Muſſulman* territory; and as in the *latter* caſe his property remains in ſuſpenſe, ſo in the *former* caſe likewiſe. The argument of our doctors is that an apoſtate, by going into a foreign country, becomes an alien; and as aliens are the ſame as the dead with reſpect to the laws of *Iſlâm*, on account of the termination of the power of ſubjecting themſelves to thoſe laws, (in the ſame manner as that power ceaſes with the *dead*,) a deſertion to a foreign country amounts to *death*. His deſertion however to the foreign country is not confirmed but by a decree of the magiſtrate, as there is ſtill a poſſibility of his returning into the *Muſſulman* territory, and hence it is requiſite that the *Kâzee* iſſue a decree, uniting him to the foreign country, ſo that ſuch union may be confirmed and become eſtabliſhed:—and as his deſertion to a foreign country ſtands (upon the *Kâzee*'s decree) in the place of his death, thoſe things which have a connexion with death do then become eſtabliſhed, (namely, the freedom of his *Modâbbirs*, and ſo forth, as aforeſaid) in the ſame manner as they become eſtabliſhed upon his *actual deceaſe*. In taking poſſeſſion of the inheritance, *Mohammed* has regard to the heir being entitled to inherit *at the time of the apoſtate's deſertion*, becauſe it is ſuch deſertion which is the occaſion of the inheritance, no regard being had to the decree of the *Kâzee* farther than as being a *confirmation* thereof,—in other words, by the *Kâzee*'s decree all poſſibility of a return into the *Muſſulman* territory is cut off, and the deſertion becomes confirmed. *Aboo Yooſaf*, on the other hand, maintains that regard is had to the heir being entitled to inherit *at the time of the Kâzee's decree*, becauſe the apoſtate is accounted as *dead* upon the *Kâzee* iſſuing ſuch decree. The ſame difference of opinion obtains where a *female* apoſtate abſconds into a foreign country.—The debts contracted by the apoſtate during his adherence to the

and the ſame of a *female* apoſtate who abſconds.

Rule in the diſcharge of

an apoſtate's debts.

faith are to be diſcharged out of his property acquired during the ſame, and the debts contracted during his apoſtacy are to be diſcharged from his property acquired in apoſtacy. The compiler of the *Heddya* remarks that this is one opinion of *Haneefa*.—Another opinion recorded from him is that his debts are all to be diſcharged from the property acquired during his adherence to the faith; and if that be not ſufficient, but a part of the debts ſtill remain unpaid, then ſuch remaining debt is to be diſcharged out of the property acquired during apoſtacy.—There is alſo a *third* opinion recorded from him, the reverſe of this.—The reaſon for the *firſt* of theſe opinions is that each of thoſe two deſcriptions of debt has been contracted on a diſtinct and ſeparate account, as the debts incurred during adherence to the faith have been contracted in the courſe of tranſactions undertaken for the acquiſition of property during adherence to the faith, ſuch as purchaſe, ſale, and ſo forth,—and in the ſame manner, the debts incurred during apoſtacy have been contracted in the courſe of tranſactions undertaken for the acquiſition of property during apoſtacy; and as the *cauſe* of incurring each deſcription of debt is different, each is reſpectively to be diſcharged from the property acquired by the tranſaction in the courſe of which the debt was incurred: the debt, therefore, contracted during adherence to the faith is diſcharged out of the property acquired during adherence to the faith;—and the debt contracted during apoſtacy is diſcharged out of the property acquired in apoſtacy, as the cauſe of the acquiſition of each property, reſpectively, is the cauſe of each deſcription of debt being incurred.—The reaſon for the *ſecond* opinion is that the property acquired by the apoſtate during his adherence to the faith is *his right*, whence it is that his heir becomes proprietor thereof by ſucceſſion: now it is a condition of ſucceſſion that the property deſcending be free from incumbrance on the part of the original poſſeſſor; and as his debts are an incumbrance upon it, the payment of thoſe precedes the right of the heirs:—but as the property acquired during apoſtacy is not *his right* (the power of appropriation being deſtroyed by apoſtacy, according

ing to *Haneefa*,) his debts are not to be diſcharged from that except where they cannot be diſcharged out of the other property, in which caſe what remains unpaid is to be diſcharged out of this property;—in the ſame manner as where a *Zimmee* dies without heirs, in which caſe his property goes to the collective body of *Muſſulmans*; but yet if any debts lie againſt the *Zimmee*, ſuch debts are previouſly to be diſcharged out of his eſtate; and ſo alſo, the property acquired by the apoſtate during apoſtacy is not *his property*, but if, notwithſtanding, any debts lie againſt him, the diſcharge of which cannot be effected from his other property, ſuch debts are to be diſcharged out of the aforeſaid property.—The reaſon for the *third* opinion is that the property acquired by an apoſtate during his adherence to the faith is the right of his heirs;—but the property acquired during his apoſtacy is purely *his own* right, wherefore the payment of his debts is firſt made out of this property, except where this is impracticable, (from the property not ſufficing for that purpoſe,) in which caſe the remainder of them is to be diſcharged out of the property acquired during adherence to the faith, as *his* right precedes the right of *his heirs*.

OBJECTION.—It was before underſtood that the property acquired by an apoſtate during apoſtacy is not *his right*; but here it is aſſerted that it is " purely *his own right*,"—which is a contradiction.

REPLY.—The expreſſion that the property is " purely *his own* " *right*," implies only that *the right of others is not connected with it*, in the manner that the right of another is connected with the property of a *dying* perſon; nor does it hence follow that the property in queſtion is *his right*, ſo as to occaſion a contradiction.—The two diſciples maintain that his debts are to be diſcharged out of his property of both deſcriptions, ſince both (according to *their* tenets) are equally *his right*, whence it is that the right of his heirs extends to both.

Certain acts of an apoſtate are ſuſpended in their effect.

ALL acts of an apoſtate with reſpect to his property, (ſuch as *purchaſe*, *ſale*, *manumiſſion*, *mortgage*, and *gift*,) done during his apoſtacy, are ſuſpended in their effect. If, therefore, he become a *Muſſulman*, thoſe acts are valid; but if he die, or be ſlain, or deſert into a foreign country, thoſe acts are null. This is the doctrine of *Haneefa.* The two diſciples ſay that thoſe acts on his part are lawful in either caſe, that is, whether he become a *Muſſulman*, or die, or be ſlain, or deſert into a foreign country. It is here proper to obſerve that the acts of an apoſtate are of *four kinds.* First, thoſe which are univerſally admitted to be of authority, ſuch as claim of offſpring, and divorce,—becauſe claim of offſpring does not depend upon *actual right of property*, inſomuch that if a father lay claim to a child born of his ſon's female ſlave, his claim is valid, and the female ſlave becomes his *Am-Walid*, although ſhe be not his *actual property*, but he has a *dubious* property in her;—and ſo alſo, divorce does not depend upon a complete power, ſince divorce proceeding from a *ſlave* is lawful, although his perſon be defective.

Objection.—Upon the inſtant of his apoſtacy, ſeparation takes place between the huſband and wife: how, then, can he pronounce divorce upon her?

Reply.—This ſuppoſes a caſe where the huſband and wife apoſtatiſe together; as is mentioned in the *Káfee.*

—Secondly, thoſe which are univerſally held to be null, ſuch as marriage and ſacrifice, becauſe the validity of marriage and ſacrifice depend upon the perſon's ſect, and an *apoſtate* is of *no* ſect.—Thirdly, thoſe which are univerſally held to remain *ſuſpended* in their effect, ſuch as contracts of copartnerſhip, as the validity of theſe depends upon ſimilarity of religion, and there is no ſimilarity between the religion of a *Muſſulman* and that of an *apoſtate.*—Fourthly, thoſe concerning the ſuſpenſion of which there is a difference among our doctors, *Haneefa* holding that they *are* ſuſpended, and the two diſciples, that they are not ſuſpended; and theſe are the acts beforementioned, namely, *purchaſe*, *ſale*, *manumiſſion*, *mortgage*, and *gift.*—The argument of the two diſciples is that the legality of thoſe acts depends upon competency, and the validity of them upon the right of property: now there is no doubt of *competency* appertaining to an apoſtate, ſince he is ſubject to the ſame civil obligations with other people; and in the ſame manner (according to them) there is no doubt concerning his power of poſſeſſing, ſince (by their tenets) his right over property continues unaffected until his death, according to what was before ſtated, that "he is neceſſitous, and alſo liable to de-"mands," (to the end;)—his right over his property, therefore, ſtill endures, whence if a child be born of his *Muſſulman* wife within *ſix months* from the date of his apoſtacy, ſuch child inherits of her; but if his child die after his apoſtacy and before his deceaſe, ſuch child does not inherit of him;—and ſuch being the caſe, his acts, as aforeſaid, are legal and valid. According to *Aboo Yooſaf* the acts of an apoſtate in a ſtate of health are lawful, becauſe it is probable that he may again become a *Muſſulman*, upon perceiving his error, and conſequently may not ſuffer death; and ſuch being the caſe, a *male* apoſtate is, with reſpect to all acts, in the ſame predicament as a *female*. *Mohammed*, on the other hand, holds that the acts of an apoſtate are legal and valid, in the ſame manner as the acts of a ſick perſon, becauſe it is not probable that a perſon who is converted and embraces any religious perſuaſion will readily abandon it, eſpecially where he embraces it after having forſaken his former faith in which he has been educated; it is therefore moſt probable that he will ſuffer death for his apoſtacy: contrary to a *female* apoſtate, ſhe not being liable to be put to death.—The argument of *Haneefa* is that an apoſtate's right over his property is diſſolved by a ſuſpended diſſolution, (as was before ſtated,) and the diſſolution or continuance of this power remaining in ſuſpenſe, it follows that the acts in queſtion alſo remain ſuſpended in their effect, as they are founded upon the right. An apoſtate, moreover, is (according to *Haneefa*) in the ſame predicament with a hoſtile infidel who comes into the *Muſſulman* territory without a protection; becauſe an apoſtate is alſo a *hoſtile infidel*, and is in the *Muſſulman* territory without a protection; and as the hoſtile infidel is liable to be impriſoned and proſecuted, and his acts remain ſuſpended, until it be ſeen whether he is made a ſlave, or ſlain, or releaſed out of courteſy, ſo in the ſame manner the acts of an apoſtate remain ſuſpended, until it be ſeen whether he become a *Muſſulman*, or be ſlain in his apoſtacy. In reply to the arguments of the two diſciples, we obſerve that an apoſtate is liable to be put to death in conſequence of the abrogation of his protection, in the ſame manner as a hoſtile infidel, who comes into the *Muſſulman* territory without a protection, is liable to be put to death, from being deſtitute of protection to his perſon;—and the expoſure to death for ſuch a reaſon occaſions a doubt with reſpect to the competency of the perſon who is liable to it. It is otherwiſe in the caſe of an *adulterer* or a *murderer*, becauſe, although theſe be liable to death, yet their being ſo is not in conſequence of *deſtruction to the protection of their perſons*, but as a retribution for their offence; and as this does not occaſion any doubt reſpecting their competency, their acts are all legal and valid.—It is otherwiſe, alſo, with reſpect to a *female* apoſtate, becauſe, as ſhe is not accounted an *infidel enemy*, ſhe is not liable to be ſlain.

An abſconded apoſtate, again embracing the faith, and returning into the *Muſſulman* territory, may reclaim ſuch of his property as is remaining in the hands of his heirs.

If an apoſtate, after a decree being iſſued uniting him to the infidels, become a *Muſſulman*, and return into the *Muſſulman* territory, he may take back whatever of his property he finds remaining in the hands of his heirs, becauſe the heirs have not taken the ſame, in virtue of their right of ſucceſſion, for any other reaſon than as he has no further occaſion for it; but when, becoming a *Muſſulman*, he returns into the *Muſſulman* territory, he has occaſion for the property; and as his neceſſity precedes the right of the heirs, he may reſume the property out of their hands.—It is otherwiſe where there is no property *nemaining in the hands* of the heirs, for in this caſe he is not entitled to ſeek indemnification from them, becauſe the heir has expended the property, from his own poſſeſſion, at a time when it was lawful for him ſo to do: neither does the above rule apply to his *Am-Walids* or *Modábbirs*, becauſe they are free, and the apoſtate is not at liberty to recover them, as the decree of the *Kázee*, awarding their freedom, has been rendered valid by the circumſtance which imparts to it that property *, and hence cannot be reverſed.

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* Probably, meaning, *his deſertion to a foreign country.*

IF an apoſtate who had deſerted into a foreign country, becoming a *Muſſulman*, come back into the *Muſſulman* territory, before the *Kázee* ſhall have iſſued any decree reſpecting him, in this caſe it is accounted the ſame as if he had continued uniformly a *Muſſulman*, and had never apoſtatiſed; as was before-mentioned.

Caſe of a child born of the ſlave of an apoſtate.

IF an apoſtate have carnal connexion with a Chriſtian female ſlave, who had been in his poſſeſſion during his adherence to the faith, and this ſlave produce a child after *more* than ſix months from the date of his apoſtacy, and he claim the child, in this caſe the ſlave becomes his *Am-Walid*, and the child is his child, but yet does not inherit of him. If, however, the female ſlave become a *Muſſlimá*, the child inherits of him, upon his death, or expatriation. His *claim of offspring* * is valid, for this reaſon, that the validity of a claim of offspring does not depend upon *actual poſſeſſion*, (as was before ſtated:)—and the child's inheriting where the mother is a *Muſſlimá*, and *not* inheriting where ſhe is a *Chriſtian*, is becauſe the child of an apoſtate is a dependant on the *father* where the mother is a *Chriſtian*, (ſince the father is more nearly related to *Iſlám*, as compulſion will be uſed to make him return to the faith, and it is probable that he may again become a *Muſſulman*;) and ſuch being the caſe, the child is accounted the ſame as an apoſtate, and an apoſtate cannot inherit of an apoſtate; but where the mother is a *Muſſlimá*, the child is a *Muſſulman*, as a dependant on the mother,—and a *Muſſulman* may inherit of an *apoſtate*.

The property

IF an apoſtate go off, with his property, into a foreign country, and the *Muſſulman* forces afterwards obtain poſſeſſion of that pro-

perty*,

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* *Arab. Iſteelád:* the term of law for a maſter laying claim to (or acknowledging) a child born of his female ſlave, and declaring it to be of his own begetting, which legaliſes the child to him. It is treated of at large under the head of *Manumiſſion of Slaves*.

tate, upon being taken, is the right of the ſtate.

perty [*], in this caſe ſuch property is plunder, and the right of the ſtate:—but if the apoſtate *firſt* deſert to the foreign country, and *then* come into the *Muſſulman* territory and take his property, and carry it off into the foreign country, and the *Muſſulman* forces afterwards obtain poſſeſſion of that property, and the apoſtate's heirs diſcover it before the general diſtribution [†], in this caſe it muſt be delivered to them; becauſe, in the *former* caſe, the property is a property in which no inheritance had ever exiſted, whereas, in the *latter* caſe, inheritance had exiſted, (whence it became the property of the heirs upon the *Kâzee*'s decree of outlawry) and therefore the heir is, in fact, already the *proprietor* of it.

A contract of *Kitâbat* entered into by [illegible] te holds

If an apoſtate deſert to a foreign country, leaving a ſlave in the *Muſſulman* territory, and the *Kâzee* decree the ſlave to belong to his [illegible] and the ſon conſtitute the ſlave a *Mokâtib*, and the apoſtate afterwards, becoming a *Muſſulman*, return into the *Muſſulman* territory, the *Akid Kitâbat* or contract of ranſom is lawful; but the ranſom, as well as the *Willa*-right over the *Mokâtib*, appertains to the reconverted apoſtate;—becauſe the contract of ranſom was legal and valid, as the ſon conſtituted the ſlave a *Mokâtib* after the *Kâzee*'s decree of expatriation, and the ſlave then fell under the ſon's abſolute authority, whence it is that the contract is *legal.* The ſon, therefore, who is his father's heir, is made to ſtand as his *agent:* now the rights of a contract appertain to the *conſtituent*, and hence the ranſom belongs to the father; and as the ſlave becomes liberated upon paying his ranſom, the *Willa*-right reſts with him of courſe, ſince the *Willa* of emancipation reſts with the perſon from whom the ſlave becomes emancipated.

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[*] That is to ſay, *take it in war*, in a military excurſion againſt the people of that country.

[†] Of the ſpoil, at the end of the excurſion.

Accidental homicide by an apoſtate is

ed

If an apoſtate ſlay any perſon accidentally, and then deſert to a foreign country, or be ſlain in his apoſtacy, the fine of blood is due only from his property acquired during his adherence to the faith, according to *Haneefa*.—The two diſciples hold that it is due from his property of every deſcription,—(that is, both from that acquired during his adherence to the faith, and alſo, from that acquired in apoſtacy,)—becauſe the tribe of an apoſtate are not liable for the fine of his offence, ſince the tribe never pay the fine impoſed upon a murderer, unleſs where a connexion ſtill ſubſiſts between them; and as no connexion continues between the apoſtate and his tribe, the fine for the apoſtate's offence falls upon his property:—for the two diſciples hold that property of either deſcription is *his property*, and, of courſe, that inheritance holds equally in both (as was formerly mentioned;) whereas *Haneefa*, on the contrary, maintains that nothing is his property except what he acquired during his adherence to the faith,—and that, as the property acquired during his apoſtacy does not belong to him, inheritance does not hold with reſpect to it, but it is forfeited to the ſtate.

An only is due for an offence

ſon of a *Muſſulman* who afterwards apoſtatizes, and then returns to the faith, and dies;

and nothing is

off

If a perſon wilfully cut off the hand of a *Muſſulman*, and the *Muſſulman* afterwards apoſtatize, and then die in his apoſtacy in conſequence of the loſs of his hand,—or go off to a foreign country, and the *Kázee* iſſue a decree of expatriation againſt him, and he afterwards become a *Muſſulman* and return into the *Muſſulman* territory, and *then* die in conſequence of the loſs of his hand,—in either caſe *an half* fine only is due from the maimer to the apoſtate's heirs:—IN THE FIRST INSTANCE, becauſe no regard is had to the *conſequence* of the act of maiming, as this conſequence followed upon an unprotected ſubject, (namely, the *perſon of an apoſtate*,) wherefore nothing is regarded but the original act of maiming, which took place during the adherence of the deceaſed to the faith, at which time he was in a ſtate of protection, whence an *half* fine is due:—contrary to where a perſon cuts off the hand of an *apoſtate*, and the apoſtate afterwards becomes a *Muſſulman*,

ſ-
tate, in the
circum-

and then dies in conſequence of the loſs of his hand; for in this caſe no fine whatever is due, becauſe here the act occurred during apoſtacy, and is therefore *biddir* *, and of no account; and a thing which is *biddir* cannot afterwards obtain any regard;—for as a thing which is in itſelf worthy of regard may become *biddir*, (as where the avenger of blood diſcharges the offender) ſo in the ſame manner an act is rendered *biddir* by apoſtacy;—and IN THE SECOND INSTANCE, becauſe the apoſtate is in this caſe accounted as *dead*, and death precludes the conſequence;—that is, if a perſon cut off another's hand, and this perſon die from ſome *other* cauſe, the conſequence of the maiming can never take place;—wherefore in this caſe alſo no regard is had to any thing but the *maiming*, on account of which an *half*-fine is due; and no regard is had to the conſequence after his again becoming a *Muſſulman*, which is a ſpecies of re-animation to him, becauſe, as his becoming again a *Muſſulman* in this manner is a *new birth* to him, no effect can afterwards take place from the former offence. This is where the *Kázee* has iſſued a decree uniting him to the infidels.

where
no decree has
been iſſued by
[illegible]
in.
ice
a *complete* fine
is due, in caſe
of the conver-
ſion and death
of the apoſ-
tate.

But if the *Kázee* have *not* iſſued any ſuch decree, whether the apoſtate abſcond to a foreign country or not,—and he become a *Muſſulman*, and then die, in conſequence of the loſs of his hand, in this caſe a complete fine is due from the maimer. This is the doctrine of the two *Elders*. *Mohammed* and *Ziffer* maintain that in all theſe caſes an *half* fine is due, becauſe, from the maimed perſon apoſtatizing *after* the loſs of his hand, any effect attending the maiming becomes *biddir*, and does not afterwards occaſion a complete fine in conſequence of his becoming a *Muſſulman*, any more than where a perſon ſtrikes off the hand of an *apoſtate*, and he becomes a *Muſſulman*, and dies in conſequence of the loſs of his hand. The argument of the two *Elders* is that, in the caſe in queſtion, the offence of maiming was committed upon a perſon who from being a *Muſſulman* was, at the time of maiming, in a ſtate of protection, and its *conſequence* alſo takes place upon a protected perſon, as the perſon maimed is a *Muſſulman* at the time of his deceaſe, wherefore a *complete fine*, (being the reſponſibility for the perſon) is due, in the ſame manner as it would be due if he never had apoſtatized. The ground of this is that no regard is had to the permanency of protection throughout the duration of the offence, regard being had to the exiſtence thereof only at the time of the cauſe taking place (the *maiming*, for inſtance,) and at the time of the eſtabliſhment of the effect of that cauſe. Now the time of *duration* of the offence is neither the time of the cauſe taking place, nor of the eſtabliſhment of the effect of that cauſe, and therefore no regard is had to the permanency of protection throughout the duration of the offence; in the ſame manner as no regard is had to the permanency of property throughout the duration of a vow;—that is,—if a man ſay to his ſlave, "If you enter this houſe, you are free," and he afterwards *ſell* that ſlave, and again purchaſe him, and the ſlave then enter the houſe, he is free, although after the vow, and in its duration, he had not been in the poſſeſſion of that perſon.

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* Shedding blood, or permitting it to be ſhed, unrevenged.

kâtib apoſtatizing and deſerting to a foreign country.

IF a *Mokâtib* become an apoſtate, and deſert to a foreign country, and there acquire property, and be afterwards made a captive with ſuch property, and brought back, and refuſe to embrace the faith, and do not become a *Muſſulman*, he is to be put to death; and the property is to be paid to his owner in diſcharge of his ranſom;—but if any thing remain after diſcharging the ranſom, it goes to his heirs, according to all the doctors. This, according to the tenets of the two diſciples, is evident; becauſe, as they hold that whatever is acquired by an apoſtate belongs to him if he be *free*, ſo in the ſame manner, whatever is acquired by an apoſtate belongs to him, if he be a *Mokâtib*: and it is ſo according to *Haneefa* likewiſe; becauſe a *Mokâtib* is proprietor of his own requiſitions ſolely in virtue of his contract of ranſom; and as this contract is not ſuſpended by his apoſtacy, but continues in full force, ſo in the ſame manner his power over property is not ſuſpended by his apoſtacy, he continuing proprietor of his own acquiſitions; and his acquiſition, as being his own property, muſt be applied to the diſcharge of his ranſom; and whatever may remain goes to his heirs; for this reaſon, that as the acts of a *Mokâtib* are not ſuſpended by the *ſtronger* obſtruction, (*ſlavery*,) it follows that they are not ſuſpended by the *weaker* obſtruction, (apoſtacy,) *a fortiori*.—Bondage is here termed the *ſtronger* obſtruction, and apoſtacy the *weaker*, as ſeveral acts of an apoſtate are univerſally admitted to be legal and valid, ſuch as the *claim of offspring*, for inſtance, as was formerly ſtated, (and moſt of his acts, ſuch as *ſale*, *purchaſe*, and ſo forth, are by the two diſciples held to be ſo,)—whereas no act whatever of a *ſlave* is of any force.

abſconded apoſtate, in a foreign coun-

he property f the ſtate.

aſes in which he grandfa- her may be the fa- ſubſti- a child.

both apoſtatize, and deſert to a foreign country, and the woman become pregnant there, and bring forth a child, and to this child another child be afterwards born, and the *Muſſulman* troops then ſubdue the territory, the child and the *child*'s child both are plunder, and the property of the ſtate:—the *child* is ſo, becauſe as the apoſtate mother is made a ſlave, her child is ſo likewiſe, as a dependant on her;—and the *child*'s child is ſo, becauſe he is an original infidel and an enemy; and as an original infidel is *fee*, or the property of the ſtate, ſo is *he:* the *woman*'s child may moreover be *compelled* to become a *Muſſulman*, but not the *child*'s child. *Haſſan* records from *Haneefa* that compulſion may be uſed upon the child's child alſo, to make him embrace the faith, as a dependant of the *grandfather*.—It is to be obſerved that there are four things reſpecting which, (according to a tradition of *Haſſan*,) the *grandfather* may be made the father's ſubſtitute,—and according to the *Zâhir Rawâyet* he may *not* be made the father's ſubſtitute;—*firſt*, *Iſlâm*,—*ſecondly*, *Sadka-fittir*,—*thirdly*, devolution of *Willa*,—and *fourthly*, bequeſts to relations.—The caſe of *Iſlâm* is ſtated above;—the caſe of *Sadka Fittir* is, that if a father be poor, or a ſlave, and the *grandfather* be rich, and free, the *Sadka-fittir* of the grandchild is incumbent upon the grandfather, according to *Haſſan*,—but according to the *Zâhir*

Rawâyet it is not incumbent. The caſe of devolution of *Willa* is that when a ſlave marries an emancipated female ſlave, and they have a child, the *Willa* of the child reſts with the *Mawla* of the mother, but if the father be afterwards emancipated, the *Willa* of the child devolves upon the *Mawla* of the father; and if the *father* be not emancipated, but the *grandfather*, the *Willa* devolves upon the *Mawla* of the grandfather, according to *Haſſan*,—but according to the *Zâhir Rawâyet* it does not ſo devolve. And the caſe of *bequeſts to relations* is, that if any perſon make a will in favour of "his *relations**," the father and mother are not included in it:—now the queſtion is whether the *grandfather* be included in it or not?—according to *Haſſan* he is included; but according to the *Zâhir Rawâyet* he is excluded, in the ſame manner as the *father*.

A boy who apoſtatizes is not put to death, but muſt be impriſoned, provided he be arrived at years of diſcretion:

THE apoſtacy of a boy, who though under age is yet arrived at years of diſcretion, is alſo regarded, according to *Haneefa* and *Mohammed*; and he may be compelled to return to the faith; he is not, however, to be put to death, but muſt be impriſoned. In the ſame manner, regard is paid to the *Iſlâm* of a boy of the ſame deſcription, for which reaſon he cannot inherit of his parents if they be infidels. *Aboo Yooſaf* ſays that his *Iſlâm* is regarded, but *not* his *apoſtacy*. *Ziffer* and *Shafeï*, on the other hand, maintain that no regard is paid either to his *Iſlâm* or his apoſtacy. The arguments of *Ziffer* and *Shafeï* upon this point are twofold:—FIRST, the boy is a *dependant* on his father and mother in *Iſlâm*, and therefore cannot be conſidered as *original* in it, ſince between *dependancy* and *originality* there is a contradiction:—SECONDLY, if his *Iſlâm* be regarded, he is ſubject to certain effects from it which are injurious to him, ſuch as incapacity to inherit [of an infidel,] and ſeparation from a wife who is an idolater; and hence he is not accounted as one of the *Muſſulmans*. The arguments of *Haneefa*, *Aboo Yooſaf* and *Mahommed* in ſupport of regard being had to his *Iſlâm* are alſo twofold:—FIRST, *Alee* embraced the faith whilſt he was yet a boy; and the prophet conſidered his *Iſlâm* as valid and ſufficient, inſomuch that *Alee* obtained much honour by the action:—SECONDLY, the boy acknowledges the faith in his heart, and teſtifies to it with his lips, and this is the ſubſtance of *Iſlâm*, and the *ſubſtance* of any thing is not liable to be ſet aſide: the conſequences of *Iſlâm*, moreover, are *eternal happineſs* and *future ſalvation*, and theſe being the greateſt advantages and natural effects of *Iſlâm*, they are accordingly eſtabliſhed;—and any injury to which he may be ſubject in conſequence of his *Iſlâm* (ſuch as incapacity to inherit, and ſo forth) is comparatively of little moment. The argument of *Aboo Yooſaf*, *Ziſfer*, and *Shafeï*, in ſupport of their opinion that no regard is to be paid to his apoſtacy, is that the apoſtacy is injurious to himſelf*. The argument of *Haneefa* and *Mohammed*, to prove that no regard is to be paid to his apoſtacy, is that the apoſtacy ſubſtantially exiſts, and what is *ſubſtantial* is not liable to be ſet aſide, as was before urged in ſupport of the opinion which aſſerts that regard is paid to his *Iſlâm*.—It is to be obſerved that the boy may be *compelled* to return to the faith after apoſtacy, as this is for his advantage; but he is not to be put to death on account of his apoſtacy, as that is *puniſhment*, and puniſhment is ſuſpended with reſpect to infants, they being objects of mercy.—All that is here ſtated applies to boys under age, but *arrived at years of diſcretion*.—As to a boy who has not yet attained diſcretion, no regard is had to his apoſtacy according to all the doctors, becauſe the declaration of ſuch does not amount to a *change of faith*. The ſame rule applies to lunatics:—and a perſon intoxicated with liquor ſo as to be deprived of his reaſon is accounted the ſame as a lunatic.

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* This ſuppoſes the term *relations* to be mentioned in a will generally, and without any ſpecification.

but not otherwiſe.

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* A perſon under age is not held in law to be capable of any act by which he may injure himſelf, ſuch as contracting debt, emancipating ſlaves, and the like; and the ſame rule is by thoſe doctors applied to the circumſtance of ſuch a perſon's *apoſtacy*.

CHAP. X.

Of the Laws concerning *Rebels.*

Rebels are of four deſcriptions.

PERSONS who reſiſt the *Imâm*'s authority are of four deſcriptions.—I. Thoſe who live in a ſtate of diſobedience to the *Imâm* without aſſigning any reaſon, whether in open force or otherwiſe; and who rob and murder *Muſſulmans*, and put travellers in fear;—and theſe are termed *Katta-al-Tareek*, or *highway robbers*, the laws reſpecting whom have been already treated of.—II. Thoſe who are *not* engaged in open force, and who rob and murder *Muſſulmans*, and put travellers in fear; but who proceed upon ſome avowed pretext; and theſe are alſo ſubject to the ſame law with *highway robbers.*—III. Thoſe who being in a large body, and poſſeſſed of a power of open reſiſtance, withdraw themſelves from their obedience to the *Imâm*, under an apprehenſion which leads them to ſuppoſe that he conducts himſelf improperly, and which impropriety of conduct is in their conception a ſufficient cauſe of war, whether it be tyranny, or infidelity: and theſe are termed *Khârijees*, or *inſurgents*; and they hold the deſtroying of *Muſſulmans*, the ſeizing of their property, and enſlaving their women, to be lawful, and accuſe the companions of the prophet of infidelity: the laws therefore reſpecting ſuch, according to all the learned, and all the traditioniſts, are the ſame as the laws concerning REBELS.—IV. *Muſſulmans* who withdraw themſelves from their obedience to the *Imâm*, and who hold it lawful to deſtroy *Muſſulmans*, and to ſeize their property, and enſlave their women, in the ſame manner as inſurgents. People of this fourth deſcription are termed *Baghât*, [rebels:] *Baghât* is the plural of *Bâghee:* the word *Bâghee*, in its literal ſenſe, means prevarication; alſo injuſtice and tyranny:—

of term

in the language of the LAW it is particularly applied to *injuſtice*, namely, withdrawing from obedience to the rightful *Imâm*, (as appears in the *Fattahal-Kadeer*.)—By the *rightful Imâm* is underſtood a perſon in whom all the qualities eſſential to magiſtracy are united, ſuch as *Iſlamiſm*, freedom, ſanity of intellect, and maturity of age,—and who has been elected into his office by any tribe of *Muſſulmans*, with their general conſent;—whoſe view and intention is the advancement of the true religion, and the ſtrengthening of the *Muſſulmans*,—and under whom the *Muſſulmans* enjoy ſecurity in perſon and property;—one who levies *tithe* and *tribute* according to law;—who, out of the public treaſury, pays what is due to learned men, preachers, *Kâzees*, *Mooftis*, philoſophers, public teachers, and ſo forth;—and who is juſt in all his dealings with *Muſſulmans*: for whoever does not anſwer this deſcription is not the *right Imâm*, whence it is not incumbent to ſupport ſuch a one, but rather it is incumbent to oppoſe him, and make war upon him, until ſuch time as he either adopt a proper mode of conduct, or be ſlain; as is written in the *Mâdin-al-hikkâyek*, copied from the *Fawâyed*.

The *Imam* muſt firſt endeavour to reconcile rebels;

IT is incumbent upon the *Imâm* to recal rebels to their allegiance, and ſhew them what is right, in ſuch a manner that the miſunderſtanding which occaſioned their defection may be removed;—becauſe *Alee* thus conducted himſelf with reſpect to the people of *Hirroo* (a diſtrict in the territory of *Koofa*,) when they rebelled;—and alſo, becauſe this mode of proceeding is eaſier than *force*, and it is poſſible that this more eaſy mode of proceeding may ſucceed in removing the evil, ſo as to afford no occaſion for more violent meaſures:—it is therefore requiſite that they be recalled to their allegiance to the *Imâm*, and ſhewn what is right.

but muſt not refrain from force, if neceſſary.

THE *Imâm* muſt not, however, neglect more forcible meaſures, but in the beginning of an inſurrection may oppoſe rebels by force of arms, ſufficient to quell them. Our author remarks that *Kadooree* has thus aſſerted in his compendium: and *Imâm Khâbir Zâda* ſays that our doctors hold it to be lawful for the *Imâm* to begin by making war upon them, where they are levying troops and collecting themſelves together. *Shafeï* maintains that it is not lawful to make war upon rebels, until they commit acts of hoſtility, becauſe it is not lawful to kill *Muſſulmans* but for the purpoſe of repulſion, and *rebels* are *Muſſulmans*:—contrary to the caſe of *infidels*, the commencing war with whom is lawful, as their infidelity (according to *Shafeï*) legalizes the putting them to death. The reaſoning of our doctors is that the propriety of commencing war upon rebels reſts upon a circumſtance which argues that *they* will commit hoſtilities on *their* part; and their levying troops, and collecting themſelves together, and withdrawing themſelves from their obedience to the *Imâm*, are all circumſtances which argue an hoſtile intention; for if the *Imâm* were to wait until they had actually commenced hoſtilities, it is likely that he might afterwards find the repulſion of them impracticable; it is therefore highly requiſite that he commence hoſtilities againſt them, under any of the above circumſtances, in order that their wickedneſs may be repelled.

The *Imâm* muſt impriſon malcontents on the firſt appearance of an inſurrection.

UPON the *Imâm* being informed of rebels purchaſing arms and inſtruments of war, and preparing for hoſtilities, he muſt inſtantly ſeize and impriſon them, until they turn from their rebellion, and repent, in order that their wickedneſs may be (as far as is poſſible) repelled.

Rule of conduct towards rebels where they have a force in *re-*

IF the rebels have a body of forces to which thoſe who fly from battle may join themſelves, in this caſe it is neceſſary, without loſs of time, to put to death all the wounded, and to purſue thoſe who fly, in order that they may not join that body, and that their wickedneſs may be repelled: but if the rebels have not a body of this kind in reſerve, their wounded muſt not be ſlain, nor thoſe of them purſued who fly from battle, as in this caſe their wickedneſs is repelled without further bloodſhed.—*Shafeï* ſays that in neither caſe are their wounded to be ſlain, or thoſe of them who fly from battle purſued, becauſe the ſlaying of them is not lawful but for the purpoſe of *repulſion*, and upon a rebel being diſabled, or flying from battle, the ſlaying of him is no longer *for the purpoſe of repulſion*, and conſequently is illegal. To this, however, it may be replied that the ſlaying of them turns upon the *argument* of hoſtility, not upon *actual* hoſtility, (as was before ſtated,) and where they poſſeſs a reſerved force to which the wounded or the fugitives may join themſelves, this argument of hoſtility exiſts.

The families and property of rebels remain inviolate.

THE families of rebels are not to be reduced to ſlavery, nor their property divided among the *Muſſulmans*, [in the manner of *plunder*.] The reaſons for this are twofold:—FIRST, *Alee*, in the war of *Jaml*, ordered that "the ſlaves of the rebels ſhould not be ſlain, nor their "wives or families enſlaved, nor their property taken," and he is legiſlator in this particular; (the expoſition of that paſſage, in the orders of *Alee*, that "*the ſlaves ſhould not be ſlain*, is, that they are not to be ſlain, *where there is no body of the rebels to which they might unite themſelves, if ſuffered to go*;—for where there is ſuch a body, it is at the diſcretion of the *Imâm* either to kill the ſlaves, or to impriſon them, ſo as to prevent their joining this body:)—SECONDLY, rebels are *Muſſulmans*, and *Iſlamiſm* occaſions protection to perſon and property.

The arms of rebels may be turned againſt themſelves.

THE *Muſſulmans* need not heſitate to fight rebels with ſuch of their arms as fall into their hands, provided they have occaſion for them. *Shafeï* maintains that this is unlawful: and the ſame difference of opinion ſubſiſts reſpecting ſuch *horſes* of the rebels as fall into the hands of the *Muſſulmans*. The argument of *Shafeï* is that as theſe are the property of *Muſſulmans*, the uſe of them, unleſs with conſent of the owner, is illegal. The arguments of our doctors upon this point are *twofold*.—FIRST, *Alee* divided the arms of the rebels among his followers in *Baſra*, and this diviſion was made on account of *neceſſity*, and not as a transfer of property:—SECONDLY, as it is lawful for the *Imám* to take the arms of *others* who are not rebels, and to divide them among the troops, to uſe according to neceſſity, it follows that the ſame act with reſpect to the property of *rebels* is lawful in the *Imám a fortiori*, on this ground, that it is lawful to adopt a *ſmall* evil, for the purpoſe of repelling a *great* one. It is incumbent on the *Imám*, moreover, to detain the property of rebels in cuſtody; and he muſt neither ſhare it as ſpoil, nor reſtore it to the owners until they repent; but upon their repentance, he may reſtore to them their property: their property is not to be ſhared as ſpoil, becauſe *rebels* are *Muſſulmans*, and *Iſlamiſm* occaſions protection to perſon and property, as was before ſtated;—but it is to be detained in cuſtody, as their wickedneſs may be repelled by cutting off their reſources; their property, therefore, is to be held in cuſtody although the *Muſſulmans* have no occaſion for it: (ſuch horſes, however, as are among their property, muſt be ſold, becauſe keeping the *price* is both eaſy, and alſo advantageous to the owner:)—and their property muſt be reſtored to them upon repentance, becauſe the reaſon of detention ceaſes upon repentance, and the property is not *ſpoil*.

The
of reb
be held in cuſtody,

their repentance.

IF the rebels ſhould have exacted *tithe* or *tribute* of the inhabitants of a territory which they had overcome, the *Imám* muſt not again levy *tithe* or *tribute* there, becauſe the *Imám* is veſted with authority to collect thoſe taxes of the people, *in virtue of the protection he affords them*; and in the caſe in queſtion he has not protected them. If, then, the rebels expend the *tithe* and *tribute* upon their proper objects, it ſuffices with reſpect to the people of whom thoſe taxes had been collected by them, and the *tithe* and *tribute* owing by them is duly rendered, as the claimant to them has received his right:—if, however, the rebels have *not* expended the tithe or tribute upon their proper objects, the people of that diſtrict are bound in conſcience to pay them over again, becauſe what they firſt gave has not been applied to the proper

***Tithe* or *tri-bute*,**

cannot be levied a
time:

proper object. Our author remarks it as an opinion of the learned in the law, that it is *not* incumbent upon the people to pay *tribute* over again, becauſe the rebels are alſo *warriors, who make war upon infidels*[*], and are therefore proper objects of expenditure of tribute, although they be *rebels*; and in the ſame manner, it is not incumbent upon them to pay *tithe* a ſecond time, where the rebels are in a ſtate of poverty, ſince *tithe* is a right of the *poor*:—but *for the future* the *Imám* will collect *tithe* and *tribute* from thoſe people, becauſe he then protects them, and conſequently his authority over them is evident.

but upon the recovery of the territory, they continue to be collected as before.

One rebel killing another does not incur any fine.

If, in an army of rebels, one of them kill another, and the rebels be afterwards overcome by the troops of the rightful *Imám*, no fine of blood is exacted of the ſlayer; nor is he ſubject to retaliation; becauſe the authority of the rightful *Imám* did not extend over him at the time of the murder, and hence the act does not occaſion either retaliation or fine;—in the ſame manner as a murder committed in a foreign country; that is, if one *Muſſulman* kill another in a foreign country, and the *Muſſulman* forces afterwards overcome that territory, the murderer is not liable to any puniſhment;—and ſo alſo in the caſe in queſtion;—becauſe the *reaſon* (namely, non-exiſtence of the *Imam*'s authority at the time of the fact,) appears in both caſes alike.

Murder, committed in a city poſſeſſed by rebels, but where they have not eſtabliſhed any juriſdiction, upon recovery of the city occaſions retaliation.

If rebels overcome a city, and one of the inhabitants wilfully murder another, and the troops of the rightful *Imám* afterwards recover the city and drive the rebels away, before they have been able to eſtabliſh any juriſdiction over the inhabitants, in this caſe retaliation muſt be executed upon the murderer, becauſe in ſuch an inſtance the authority of the *Imám* has never been completely terminated there:—retaliation is therefore due.

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[*] As being *Muſſulmans*, and conſequently ſubject to the divine injunction in this particular.

A loyal perſon killing a rebel may yet inherit of him: and, in the ſame manner, a rebel may inherit of a loyal perſon, if he juſtify the act.

If a perſon, not a *rebel*, ſlay a rebel, the murderer nevertheleſs inherits of the rebel*, where connexion of inheritance ſubſiſts between the parties (ſuch as *father* and *ſon* for inſtance.)—If, moreover, one *rebel* kill another, and declare that "he had ſlain him *in the right* †," and perſiſt in this declaration, in this caſe alſo the ſlayer inherits of the ſlain: but if the ſlayer aver that "he had killed him *unrightfully*," in this caſe he cannot inherit of him. This is the doctrine of *Haneefa* and *Mohammed*. *Aboo Yooſaf* maintains that the ſlayer cannot inherit of the ſlain in either caſe, and ſuch is alſo the opinion of *Shafeï*. This difference of opinion has its foundation in the rule of our doctors, that where any perſon, not a *rebel*, deſtroys either the perſon or the property of a rebel, nothing whatever is incumbent upon him, neither *fine*, *retaliation*, nor indemnification for the property,—nor is he an *offender*, becauſe every perſon not rebellious is commanded to make war upon rebels, for the purpoſe of repelling their wickedneſs;—and in the ſame manner a *rebel*, if he kill one who is not a rebel, is not liable either to fine or retaliation:—but yet he is an *offender*.—According to *Shafeï*, on the other hand, (in conformity with an opinion of his before delivered,) the rebel is liable to *fine*, *retaliation*, or *indemnification* for the property:—and the ſame difference of opinion obtains in a caſe where an apoſtate dies, or deſerts to a foreign country, after having deſtroyed the perſon or property of any one. The argument of *Shafeï* is that the rebel in queſtion has deſtroyed protected property, or has ſlain a perſon of protected blood, and is conſequently anſwerable, in the ſame manner as is the rule with reſpect to an apoſtate who is guilty of a deſtruction of perſon or property before he has become independent of the *Muſſulman* government ‡ by uniting himſelf to a foreign power. The arguments of our doctors upon this point are twofold:—FIRST, what they maintain is the united opinion of all the companions, as recorded by *Zâbree*:—SECONDLY, the rebel in queſtion has committed the deſtruction under an invalid pretext; and an *invalid* pretext ſtands the ſame as a *valid* pretext, in reſpect to the obligation of reſponſibility, where, together with the invalid pretext, there is alſo a power of open reſiſtance;—in the ſame manner as where an alien kills a *Muſſulman* in a foreign country, in which caſe the alien, if he afterwards become a *Muſſulman*, is not reſponſible for the murder, becauſe (at the time of the murder) he poſſeſſed a power of open reſiſtance*, and alſo a pretext.—The principle upon which this proceeds is that in order to the law taking effect upon a perſon againſt whom any thing lies, it is requiſite that he either acknowledge the law, or that there exiſt a power of enforcing the law upon him at the time of the fact:—now a *rebel* does not acknowledge the illegality of ſlaying one who is *not* a rebel, ſince in his belief (in conformity with his *invalid pretext*,) the ſlaying of ſuch a perſon is allowable;—neither is there a power of enforcing the law upon a rebel, ſince the *Imâm*'s authority is terminated with reſpect to a rebel, in conſequence of the rebel being poſſeſſed of a power of open reſiſtance.—The caſe is othewiſe *previous* to the eſtabliſhment of the power of open reſiſtance, as the *Imâm*'s authority is then not extinguiſhed.—It is alſo otherwiſe where he ſlays *without* a pretext, as in this caſe an obligation of reſponſibility reſts upon him according to his own belief.—It is contrary, alſo, to *criminality*, as a rebel is an *offender* in ſlaying a perſon who is *not* a rebel, although he be poſſeſſed of a power of open reſiſtance; for the poſſeſſion of this power does not prevent a circumſtance being *ſinful*, ſince the ſinfulneſs of an act is on account of the right of the LAW, and his poſſeſſion of the power of open reſiſtance is not eſtabliſhed with reſpect to the LAW.—This point, therefore, being eſtabliſhed, it is to be obſerved that the ſlaying of a rebel by one who is *not* a rebel is not an *unrightful* act, (the rebel being ſlain by him *in the right*,) and therefore neither prevents inheritance nor occaſions reſponſibility.—The argument of *Aboo Yooſaf*, (in the caſe of a rebel killing a loyaliſt) is that an invalid pretext has no regard paid to it further than merely to prevent reſponſibility; reſponſibility therefore is not incumbent: but yet the ſlayer does not inherit, becauſe his being the heir depends upon the previous eſtabliſhment of his right of inheritance; and an invalid pretext is of no conſideration to eſtabliſh a right of inheritance; wherefore he does not inherit of the ſlain. The argument of *Haneefa* and *Mohammed* upon the point in queſtion is that the ſole reaſon why one relation inherits of another relation is becauſe relationſhip occaſions the eſtabliſhment of a right of inheritance;—and relationſhip exiſts in the caſe here ſuppoſed: now inheritance is rendered illegal only by the act of killing, which being ſupervenient, there is a neceſſity to abrogate the ſupervenient illegality; and an invalid pretext is ſufficient for this purpoſe, in the ſame manner as it ſuffices to abrogate the obligation to reſponſibility: the invalid pretext, therefore, is regarded for the purpoſe of doing away the illegality:—one condition of it, however, is that the murderer continue ſteady in his invalid pretext, and in his belief;—for if he were to ſay, "I now am ſenſible that I ſlew him *unrightfully*,"—in this caſe he would be reſponſible for the act, as the pretext aforeſaid, which had prevented reſponſibility, no longer exiſts.

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* By the law of inheritance, a murderer is incapacitated from inheriting of the perſon whom he has murdered, whatever be their relative connexion.

† That is, in the cauſe of the rightful *Imâm*, as being a *rebel*.

‡ Literally, *before he has acquired a power of open reſiſtance*, for upon this *power of open reſiſtance* being (by whatever means) acquired, a perſon is no longer conſidered as being *ſubject to the law*.

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* That is, was altogether independent of the *Muſſulman* government.

Arms or armour muſt not be ſold to rebels:

but materials to make arms

The ſale of armour or warlike ſtores to rebels, or in their camp, is abominable, becauſe ſelling arms into the hands of a rebel is an aſſiſtance to defection. There is, however, nothing objectionable in the ſelling of arms in a city (ſuch as *Koofa*, for inſtance,) either to an inhabitant, or to a perſon of whom it is not known whether he be a rebel, although he ſhould actually belong to the rebels, becauſe the bulk of people in cities are commonly of loyal principles.—It is to be obſerved, alſo, that it is not criminal to ſell to rebels any thing except what may be ſtrictly termed *arms*, inſomuch that materials to conſtruct arms, (ſuch as *iron*, and ſo forth,) may be ſold to them without offence;—in the ſame manner as it is illegal to ſell muſical inſtruments (ſuch as *lutes*, for inſtance,) but it is not illegal to ſell the wood of which they are made;—and analogous to this is alſo the ſale of grapes, or *wine*,—that is to ſay, the ſelling of grapes to a perſon who will make wine of thoſe grapes is not illegal, although the ſale of *wine* be prohibited.

HEDÂYA.

BOOK X.

Of the *Laws* reſpecting *Lakeets*, or *Foundlings*.

LAKEET, in its primitive ſenſe, ſignifies any thing lifted from the ground:—the term is chiefly uſed to denote an infant abandoned by ſome perſon in the highway:—in the language of the LAW it ſignifies a child abandoned by thoſe to whom it properly belongs, from a fear of poverty, or in order to avoid detection in whoredom.—The child is termed *Lakeet*, for this reaſon, that it is eventually *lifted from the ground*, wherefore this term is *figuratively* applied, even to the *property* which may happen to be found upon it. The perſon who takes up the foundling is termed the *Mooltakit*, or *taker-up*.

Definition of *Lakeet*.

THE taking up of a foundling is laudable and generous, as it may tend to preſerve his life. This is where the finder ſees no immediate reaſon to ſuppoſe that if the child be not taken up it may periſh;—

The taking
up of a ſoundling is laud-

ſome caſes)
incumbent.

but where he ſees reaſon to apprehend that it may otherwiſe periſh, the taking of it up is *incumbent*.

A foundling is *free*;

A FOUNDLING is free; becauſe *freedom* is a quality originally inherent in MAN; and the *Muſſulman* territory, in which the infant is found, is a territory of *freemen*, whence it is alſo free: moreover, *freemen*, in a *Muſſulman* territory, abound more than *ſlaves*, whence the foundling is free, as the *ſmaller* number is a dependant of the *greater*.

and is main-

THE maintenance of a foundling is to be defrayed from the public treaſury; becauſe it is ſo recorded from *Omar*;—and alſo, becauſe, where the foundling dies without heirs, his eſtate goes to the public treaſury; and as that is the property of the *Muſſulman* community, his maintenance muſt be furniſhed from this property, ſince as the advantage reſults to the community, the loſs alſo falls upon the community; —whence it is that the *Deyit* or fine of blood is due from the public treaſury, where a foundling commits manſlaughter.

A foundling owes nothing to his *Mooltakit* for ſubſiſtance unleſs he furniſh it by order of the magiſtrate.

THE *Mooltakit* is not to exact any return from the foundling on account of his maintenance, ſince in maintaining him he acts gratuitouſly, as he has no authority over him:—he therefore cannot exact any return from the foundling,—except where he has furniſhed him maintenance by order of the magiſtrate, in which caſe this maintenance is a debt upon the foundling, becauſe, the magiſtrate's authority being *abſolute*, he is empowered to exact the return from the foundling.

No perſon can take a foundling from his *Mooltakit* but by virtue of a *of pa-*

IF any perſon take up a foundling, no other perſon is at liberty to take the foundling from him, becauſe the right of charge of the foundling is eſtabliſhed in him, as he firſt laid hands upon it.—If, however, any perſon *claim* the foundling, ſaying "This is my child," the claimants declaration is credited on a principle of benevolence. This is where the *Mooltakit* does not advance any *claim of parentage*: but if the *Mooltakit* alſo make a claim, ſaying "This is my child," he has the preference, becauſe both parties are upon an equal footing with reſpect to their claim; but one of them, namely, the *Mooltakit*, is in immediate poſſeſſion, and is therefore preferred to the other. Analogy would require that the declaration of the claimant be not credited, becauſe in conſequence of it the right of the *Mooltakit* is deſtroyed: but the reaſon for a more favourable conſtruction of the law in this particular is that the claim of the plaintiff is a declaration upon a point which is advantageous to the infant, as he thereby obtains the honour of an avowed parentage, and the diſgrace of a want of parentage is by the claim removed from him. Some have aſſerted that the declaration in queſtion is valid only with reſpect to the eſtabliſhment of parentage, but not with reſpect to the deſtruction of the *Mooltakit*'s right of poſſeſſion;—and ſome, again, ſay that upon the parentage being eſtabliſhed, the *Mooltakit*'s right of poſſeſſion is deſtroyed, becauſe one conſequence of an eſtabliſhment of parentage is that the father has a preference, in the charge of his child, over all others.

A *claim of parentage* with reſpect to his foundling is admitted.

If a *Mooltakit* declare his foundling to be *his own child*, after having already declared it to be *a foundling*, ſome ſay that his declaration is valid, both from analogy, and alſo on a principle of benevolence, becauſe his claim reſpects a thing already in his hands, and is uncontroverted,—nor is any other perſon's right thereby deſtroyed. The better opinion, however, is that his claim is valid only on a *principle of benevolence*, and not from *analogy*, becauſe the *Mooltakit* contradicts himſelf, as he at firſt declared the child to be a foundling, and afterwards avers it to be *his own child*;—and the reaſon for a more favourable conſtruction is that the contradiction reſpects a thing of a concealed nature, ſince it is poſſible that this child may have been born of his wife, without his knowledge, and that he afterwards comes to a knowledge of the circumſtance.

Caſe of *claim of*

If two perſons advance a claim together, each aſſerting—"the "foundling in the hands of ſuch a perſon is my child," and one of by two perſons.

them point out a particular *mark* upon the foundling's body, and not the other, the foundling is adjudged to him, becauſe apparent circumſtances bear teſtimony in his favour, as the mark correſponds with his declaration. But if neither of them point out any particular mark, the foundling is adjudged to *both* of them, becauſe they are both upon a footing with reſpect to the ground of their claim. If one of them, however, lay his claim firſt [that is, before the other,] the foundling is adjudged to him, becauſe his right is eſtabliſhed at a time when no perſon controverted it;—except where the other brings evidence, as evidence is more powerful than a ſimple *claim*.

A foundling diſcovered by a *Zimmee* in a *Muſſulman* territory is a

IF a foundling be taken up in a *Muſſulman* city or village, and a *Zimmee* claim it as *his child*, the parentage is eſtabliſhed in the *Zimmee*, but the child is a *Muſſulman*. This proceeds upon a favourable conſtruction; becauſe the claim of the *Zimmee* involves two points, I. a declaration of parentage, which is *advantageous* to the child, —II. a deſtruction of the *Iſlamiſm* eſtabliſhed from the circumſtance of the child being found in a *Muſſulman* territory, which is *injurious* to the child; and his claim is admitted ſo far as it is advantageous to the child, but not ſo far as to be injurious to him. If, however, the child be found in a city or village of the *Zimmees*, or in a *church* or *ſynagogue*, it is a *Zimmee*. This laſt opinion is univerſal, (that is to ſay, is unanimouſly admitted) where the foundling is taken up, in thoſe places, *by a Zimmee*:—but if a foundling be taken up in any of thoſe places by a *Muſſulman*, or if a *Zimmee* take up a foundling in any *Muſſulman* place, there is a difference of opinion; for it is ſaid in the *Mabſoot*, treating of foundlings, that in this caſe the *place* is regarded, and not the *Mooltakit* or taker-up of the foundling;—that is, if it be found in a *Muſſulman* place, the foundling is a *Muſſulman*, and if not, it is a *Zimmee*, whether it be taken up by a *Muſſulman* or an *infidel:* and the reaſon is this, that the foundling has been firſt diſcovered in that place. In ſome copies of the book of claims from the *Mabſoot* it is ſaid that in this caſe regard is had to the

tory, he is a *Zimmee*.

is, if a *Muſſulman* have taken up the foundling, it is a *Muſſulman*, and if a *Zimmee* have taken it up it is a *Zimmee*:—(and the ſame is mentioned by *Ibn Simâia* from *Mohammed*:) and the reaſon is this, that *poſſeſſion* is more powerful than *place*; becauſe, if parents were brought as captives, with their infant child from a foreign country into the *Muſſulman* territory, the infant is an infidel in conformity with the ſtate of the parents, from which it is evident that *poſſeſſion* is more powerful than *place*. In other copies of the book of claims it is ſaid that, out of tenderneſs to the child, regard muſt be invariably had to *Iſlám*;—in other words, if the child be found in a place belonging to *Zimmees*, and be there taken up by a *Muſſulman*, it is a *Muſſulman*; and if it be taken up by a *Zimmee* in a *Muſſulman* place, it is in this caſe alſo a *Muſſulman*.

A foundling cannot be claimed as a *ſlave*.

A ſlave's claim of parentage admitted; but the foundling is *free*.

If any perſon lay claim to a foundling, as being *his ſlave*, his claim is not admitted, becauſe as it is apparent that the foundling is *free*, it cannot be ſuppoſed a ſlave unleſs the claimant produce evidence to prove that it belongs to him *as ſuch*. Obſerve, alſo, that if a *ſlave* were to claim a foundling, ſaying "this is my child," the parentage is eſtabliſhed in him, becauſe this is advantageous: the foundling, however, is *free*, becauſe the child of a man who is a ſlave is free when born of a *free* woman, and it is a ſlave when born of a woman who is a *ſlave*; concerning the child being a ſlave, therefore, there is a doubt; and hence its *freedom*, which is ſhewn by apparent circumſtances, cannot be deſtroyed, becauſe of the doubt. A freeman, in claiming a foundling, has preference to a ſlave, and a *Muſſulman* has preference to a *Zimmee*, becauſe the claim of a *freeman* or of a *Muſſulman* is moſt advantageous to the infant.

The property diſcovered upon a foundling is *his*; and may be applied to his

If there be any property upon a foundling (ſuch as *bracelets* and ſo forth,) ſuch property belongs to the foundling, becauſe apparent circumſtances argue this: and in the ſame manner, and for the ſame reaſon, if there be any property faſtened on the animal upon which a foundling is expoſed, ſuch property alſo belongs to the foundling. The *Mooltakit* moreover muſt expend this property in ſupplying the wants of his foundling, upon an order from the *Kâzee*, becauſe no perſon is known as proprietor of it, and the *Kâzee* has authority to expend property of this nature upon ſuch an object. Some ſay that the *Mooltakit* is at liberty to expend the property in ſupplying the wants of his foundling, *without* any order from the *Kâzee*, becauſe it appears that the property in queſtion belongs to the foundling; and a *Mooltakit* is authoriſed to provide ſubſiſtence for his foundling, and to purchaſe ſuch articles as are requiſite and neceſſary for him, ſuch as *victuals* and *clothing*.

It is not lawful for a *Mooltakit* to contract his foundling in marriage, becauſe he has no authority for ſo doing, ſince the reaſon for ſuch authority, (namely, *relationſhip*, *proprietorſhip*, or *ſovereignty*,) do not exiſt in him. In the ſame manner, it is not lawful for a *Mooltakit* to perform any acts reſpecting the property of his foundling; analogous to the reſtriction upon a *mother*;—that is, a mother has a right to the charge of her infant child, but yet is not at liberty to perform any acts reſpecting his property; and a *Mooltakit* ſtands in the ſame predicament. The principle upon which this proceeds is that authority to act with reſpect to the property of an infant is eſtabliſhed with a view to the increaſe of that property; and this is aſſured only by two circumſtances, *perfect diſcretion*, and *complete affection*: now in each of the perſons in queſtion only *one* of theſe qualities exiſts; for a mother, although ſhe entertain a *complete affection* for her child, is deficient in point of *diſcretion*; and a *Mooltakit*, although he be poſſeſſed of *perfect diſcretion*, is deficient in *affection*.

It is lawful for a *Mooltakit* to take poſſeſſion of any thing preſented to his foundling as a *gift*, becauſe this is of ſingular advantage to the foundling: and for this reaſon it is that an infant is at liberty to take poſſeſſion of a gift, where he has attained diſcretion; and in the ſame manner the *mother* of an infant, or her *executor*, are at liberty to take poſſeſſion of any gift preſented to the infant.

A MOOLTAKIT is at liberty to ſend his foundling to ſchool for the purpoſe of education, becauſe this comes under the head of *tuition* and *inſtruction*, and attention to his welfare. and ſend him to ſchool.

A MOOLTAKIT is at liberty to *hire out* his foundling.—Our author remarks that this is recorded by *Kadooree* in his compendium. In the *Jama Sagheer* it is ſaid that it is *not* lawful for a *Mooltâkit* to hire out his foundling;—and this is approved. The ground upon which the report of *Kadooree* proceeds is that letting out to hire is one mode of inſtruction. The reaſon for the oppoſite doctrine, as ſtated in the *Jama Sagheer*, is that a *Mooltakit* is not at liberty to turn the faculties of his foundling to his own advantage; he is therefore in the ſame ſituation as an *uncle*: contrary to the caſe of a *mother*, ſince ſhe is at liberty to turn the faculties of her child to her own advantage, as ſhall be hereafter demonſtrated in treating of *Abominations*. He cannot let him out to

HEDÂYA.

BOOK XI.

Of *Looktas*, or *Troves.*

LOOKTA ſignifies property which a perſon finds lying upon the ground, and takes away for the purpoſe of preſerving it, in the manner of a *truſt.* It is proper to obſerve that the terms *Lakeet* and *Lookta* have an affinity with reſpect to their *ſenſe*, the difference between them being merely this, that *Lakeet* is uſed with regard to the human ſpecies, and *Lookta* with regard to any thing elſe.

trove pro-erty is as a *-uſt* in the ands of the nder;

A LOOKTA, or *Trove* property, is conſidered as a truſt in the hands of the *Mooltakit* or finder, where he has called perſons to witneſs that "he takes ſuch property in order to preſerve it, and that "he will reſtore it to the proprietor,"—becauſe this mode of taking it is authoriſed by the LAW, and is even the *moſt eligible* conduct [*], according to many of our doctors. This is where there is no apprehenſion of the property being damaged or deſtroyed*:—but where that is to be apprehended, the taking of it up is *incumbent*, according to what the learned in the law have remarked upon this point. Now ſuch being the caſe, the property is not a ſubject of reſponſibility; that is, indemnification for the trove property is not incumbent upon the finder, where it happens to periſh in his hands: and in the ſame manner, the finder is not reſponſible in a caſe where himſelf and the proprietor both agree that he had taken the property avowedly "for "the owner;" becauſe their agreement in this point is a proof with reſpect to both; and hence the declaration of the proprietor that "he [the finder] "had taken them for the owner" amounts to the ſame as if the finder were to produce evidence that he had taken them for the owner.—If, however, the finder declare "I took them for "*myſelf*," reſponſibility is incumbent upon him according to all authorities, becauſe he here appears to have taken the property of another without that other's conſent, and without the permiſſion of the LAW.

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[*] That is to ſay, the taking up of the property is *permitted* by the LAW, and is even *more eligible* than ſuffering it to remain where it is found.

who is not reſponſible for any damage it may ſuſtain in his hands,

unleſs he avow that he took the property with a view to convert it to his own uſe.

If the finder ſhould *not* have called any perſon to witneſs, at the time of his taking the property, that "he took it for the owner," and he and the owner afterwards differ upon this point, the finder ſaying "I took it *for the owner*,"—and the owner denying this,—indemnification is due, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* ſays that indemnification is not due, and that the *finder*'s declaration is to be credited, as appearances teſtify in his behalf, becauſe it is probable that his intention was *virtuous*, and not *criminal*. The argument of *Haneefa* and *Mohammed* is that the finder has already acknowledged the fact which occaſions reſponſibility, (namely, his taking the property of another,) and afterwards pleads a circumſtance in conſequence of which he is diſcharged from reſponſibility, by declaring

The finder is reſponſible for the trove, if he have not witneſſes to teſtify that *he took it for the* claring that he had taken the property for *the owner*; but as this is a *doubtful* plea, he is not diſcharged from reſponſibility: and with reſpect to what is urged by *Aboo Yooſaf*, that "appearances teſtify in "the finder's behalf," they reply that in the ſame manner as appearances argue that the finder took the property for the *owner*, ſo do they likewiſe argue that he has taken them for *himſelf*, as it is probable that a perſon who performs acts with reſpect to property does ſo for *himſelf*, and not for *another*; and hence, as appearances on both ſides lead to oppoſite concluſions, they are on both ſides dropt.

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* Meaning—"*in caſe of its not being taken up.*"

he trove is ufficiently itneſſed by he finder's

In calling people to witneſs it ſuffices that the finder ſay to the byſtanders "If ye hear of any one ſeeking for this *trove*-property, "direct him to me;"—and this, whether the trove property conſiſt a ſingle article, or of numerous articles, becauſe, as the term *Lookta* is a *generick* noun, it applies either to a ſingle article, or to ſeveral different articles.

e advertiſed

for

trove property be of leſs value than ten *dirms*, it behoves the finder to advertiſe it for ſome days,—(that is, for ſo long as he deems expedient,)—but if it exceed ten *dirms* in value, he muſt advertiſe it for the ſpace of a year. The compiler of the *Hedâya* remarks that this is one opinion from *Haneefa*. *Mohammed*, in the *Mabſoot*, maintains that the finder ſhould advertiſe it for the ſpace of a year, whether the value be *great* or *ſmall*, (and ſuch is alſo the opinion of *Shafeï*,) as the prophet has ſaid "*the perſon who takes up a* "*trove property muſt advertiſe it for a year*,'—without making any diſtinction between a *ſmall* property and a *great* property. The reaſon for the former opinion is that the fixing it at the ſpace of a *year* occurred reſpecting a trove property of the value of one hundred *deenars*, which are equal to a thouſand *dirms*; now ten *dirms*, or any thing above that ſum, are the ſame as a thouſand *dirms* with reſpect to the amputation of a thief's hand, or the legalizing of generation*, whence it is enjoined to advertiſe a trove property for *a year*, out of caution; but any thing *ſhort* of ten *dirms* does not reſemble a thouſand *dirms* with reſpect to any of thoſe particulars, whence this point is left to the diſcretion of the finder of a property of that value. Some allege that the approved opinion is that there is no particular ſpace of time, this being left entirely to the diſcretion of the finder, who muſt advertiſe the trove property until he ſee reaſon to conclude that it will never be called for by the owner, and muſt then beſtow it in alms. All that is here advanced proceeds upon a ſuppoſition that the trove property is of a laſting and unperiſhable nature: but if it be of a periſhable nature, and unfit to keep, it muſt be advertiſed until it is in danger of periſhing, and muſt then be beſtowed in alms. It is proper to remark that the finder muſt make advertiſement of the trove property in the place where he found it, and alſo in other places of public reſort, as by advertiſing it in ſuch places it is moſt probable that the owner may recover it.

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* Ten *dirms* is the ſmalleſt dower admitted in marriage.

If the trove property be of ſuch a nature as that it is known that the owner will not call for it, (ſuch as date-ſtones, or pomgranate ſkins) it is the ſame as if the owner had thrown it away, inſomuch that it is lawful to uſe it without advertiſement: but yet it ſtill continues the property of the owner*, as transfer to a perſon unknown is not valid.

A trove of an

converted by
the finder to
his own uſe.

If the finder duly advertiſe the trove property, and diſcover the proprietor, it is well:—but if he cannot diſcover him, he has two things at his option;—if he chuſe, he may beſtow it in alms, becauſe it is incumbent to reſtore the property to the owner as far as may be poſſible, and this is to be effected either by giving the actual property

If the owner

the property

the owner.

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[*] That is to ſay, although it be lawful for the finder to uſe it, yet the owner has a claim upon him for the value.

to the owner, where he is diſcovered, or by beſtowing it in alms, ſo as that a return for it, (namely, the *merit*) may reach the owner, as he will aſſent, upon hearing of its having been ſo beſtowed: or if the finder chuſe, he may continue to keep the property, in hopes of diſcovering the owner and reſtoring it to him.

beſtowed in *alms*, the owner may either ratify the alms-gift,

If the finder of a trove property diſcover the owner, after having beſtowed it in alms, the owner has two things at his option:—if he chuſe, he may approve of and confirm the charity, in which caſe he has the *merit* of it; becauſe, although the finder has beſtowed it in alms by permiſſion of the LAW, yet as the owner has not conſented to his ſo doing, the *alms-gift* remains ſuſpended upon his conſent to it: as the *pauper*, however, becomes endowed with the property in queſtion *previous* to his conſent, it does not remain ſuſpended upon the continuance of the ſubject*: (contrary to a caſe of ſale by an unauthoriſed perſon; in other words, if an unauthoriſed perſon execute a ſale, the validity of it depends upon the continuance of the ſubject †, that is, of the article ſold, becauſe the purchaſer does not become endowed with it until *after* conſent:) or, if the owner chuſe, he may take an indemnification from the finder, becauſe he has beſtowed a property upon the poor without conſent of the proprietor.

or take indemnification from the finder,

OBJECTION. It would appear that indemnification is not incumbent upon the finder, as he has beſtowed the property in alms, with the conſent of the LAW.

REPLY.—His beſtowing it in alms, with the conſent of the LAW, does not oppoſe the obligation of reſponſibility, in behalf of the right of the owner; in the ſame manner as where a perſon eats the property of another when periſhing with famine; for in this caſe he owes indemnification, although he be permitted by the LAW to eat another's property in ſuch a ſituation; and ſo alſo in the caſe in queſtion. —Or, if the owner chuſe, he may take indemnification from the *pauper*, where the trove property has periſhed in his hands,—becauſe he has taken poſſeſſion of the property of another perſon without his conſent;—or, if the property be remaining in the hands of the pauper, the owner may take it from him, as he thus recovers his *actual property*.

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* "*Upon the continuance of the ſubject.*" That is, upon the continuance of the property *in the hands of either the donor or the proprietor.*

† That is, upon the continuance of the property, which is the ſubject of the ſale, in the hands of the owner.

or from the pauper upon whom it has been ſo beſtowed: or, if ſtill exiſting, may claim reſtitution of it.

OBJECTION.—It has been already ſtated that the pauper becomes endowed with the property *previous* to the owner's conſent; whence it would appear that the owner has no right to reſtitution.

REPLY.—Eſtabliſhment of property does not oppoſe a right to reſtitution; in the ſame manner as a donor is at liberty to reſume his gift, although the donee have become proprietor upon taking poſſeſſion of it.

Stray animals ought to be ſecured and taken care of for the owner:

IT is laudable to ſecure and take care of ſtrayed cattle; ſuch as *oxen*, *goats*, or *camels*. *Malik* and *Shafeï* maintain that where a perſon finds ſtrayed camels or oxen in the deſert*, it is moſt eligible to leave them, the ſeizing of them being abominable:—and concerning the ſecuring of ſtrayed *horſes* there is the ſame difference of opinion. The argument of *Malik* and *Shafeï* is that *illegality* is *originally* connected with taking the property of another, which is not allowable except where there is apprehenſion of its periſhing if it be not taken: but where a trove property is of ſuch a nature as to be capable of repelling beaſts of prey, (ſuch as *oxen*, who may repel them with their horns, or *camels* and *horſes*, who may repel them with their hoofs or their teeth,) there is little apprehenſion of its periſhing: it is ſtill however to be ſuſpected that it *will* periſh, and hence it is declared abobut he is not reſponſible to the finder for the ſubſiſtence, unleſs

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* *Arab. Sihra.* This is the term applied in general to the extenſive and barren deſerts of *Arabia*; it alſo means any waſte or unencloſed land.

direct them to be hired out for that purpoſe,

or, if unfit, to be ſold, and the price re- for the ;

he think fit to order them a

that caſe a

minable to ſecure it, and moſt laudable to leave it*. The argument of our doctors is that the animals in queſtion are *trove property*, and there is reaſon to apprehend their periſhing, whence it is laudable to ſecure and advertiſe them, in order that the property may be preſerved, in the ſame manner as the ſecuring of ſtrayed *goats* is laudable according to all. If, moreover, the finder give ſubſiſtence to troves of this deſcription without authority from the magiſtrate, it is a gratuitous act, becauſe of his not poſſeſſing any authority: but if he give ſubſiſtence by order of the magiſtrate, it is a debt upon the owner, becauſe the magiſtrate is endowed with authority over the property of an abſentee, for the purpoſe of enabling him to act with kindneſs† to the abſentee; and the giving of ſubſiſtence is a kindneſs on ſome occaſions, as ſhall be demonſtrated elſewhere. If the queſtion reſpecting the ſubſiſtence of the troves be brought before the magiſtrate, he muſt inquire into the particulars; and if the troves be capable of *hire*, (ſuch as *horſes*, *camels*, or *oxen*) he muſt order them to be hired out, and ſubſiſted from their hire, becauſe in this caſe the animals continue the property of the owner without ſubjecting him to any debt: (and a ſimilar judgment muſt be paſſed with reſpect to fugitive ſlaves:)—but if the troves be unfit for *hire*, (ſuch as *goats* or *ſheep*,) and it be apprehended that, if the finder were to ſubſiſt them, the ſubſiſtence would equal their value, the magiſtrate muſt direct them to be ſold, and the price to be kept, in ſuch a manner that the troves may be *virtually* preſerved, in their *value*, becauſe the preſervation of them in *ſubſtance* is impracticable.—If, however, the magiſtrate deem it fit to give ſubſiſtence, he muſt adjudge ſubſiſtence to be making the ſame a debt upon the owner of the animals,—becauſe the magiſtrate is appointed for the purpoſe of exerciſing humanity and kindneſs; and the giving of ſubſiſtence is a kindneſs both to the *owner* and to the *finder*;—to the *owner*, becauſe his property is thus preſerved to him in ſubſtance; and to the *finder*, becauſe the ſubſiſtence he furniſhes is thus made a debt upon the owner. The learned in the law, however, have ſaid that the magiſtrate is to iſſue the order for ſubſiſtence only for the term of two or three days, in hopes that the owner may appear; and that if the owner do not appear, he muſt then order the troves to be ſold, becauſe to afford ſubſiſtence to them for a continuance would be to eradicate the property, whence there would be no kindneſs in affording them ſubſiſtence for a *long* term (that is, for a term *beyond* three days.)—It is obſerved, in the *Mabſoot*, that the production of evidence is requiſite,—that is, the magiſtrate is not to give an order for ſubſiſting the animal, except where the finder produces evidence to prove that “ſuch an animal is a *trove*;” and this is approved, becauſe it is poſſible that he may have obtained poſſeſſion of the animal by *uſurpation*, and in a caſe of *uſurpation* the magiſtrate does not give an order for ſubſiſtence, but directs the thing uſurped to be reſtored to the owner, except in a caſe of *depoſit*, which cannot be proved without evidence; the production of evidence, therefore, is eſſentially requiſite, in order that the actual ſtate of the caſe may be aſcertained.

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* This is ſtrange reaſoning: it may perhaps have ſome reference to *predeſtination*; i. e. *as thoſe animals ſeem* DESTINED *to periſh, it is impious to attempt to prevent this deſtiny.*

† By the term *kindneſs* is here and elſewhere meant *a due attention to the intereſt of the concerned.*

owner:

more than a *few days*;

duce evidence in proof of the trove.

Objection.—Evidence is not admiſſible without an adverſary; and in the caſe in queſtion there is no adverſary;—how, therefore, can evidence be admitted?

Reply.—The evidence, in the preſent caſe, is not required for the purpoſe of a *judicial decree*, ſo as to make the exiſtence of an adverſary a neceſſary condition.

—If the finder ſay “I have no evidence of the animal being “with me as a *trove*,” ſtill as it is apparent that it *is* a trove, the magiſtrate muſt ſay “ſubſiſt this animal *provided your declaration be true!*” and then, if the finder's declaration be true, he will have a claim upon the owner for the ſubſiſtence, but not if he be an *uſurper*. It is here neceſſary to remark that what is advanced above, that “the magiſtrate muſt adjudge ſubſiſtence to be

If the finder have no evidence, the order for ſubſiſtence muſt be conditioned upon the veracity of his declaration.

“given,

The finder has no claim upon the owner for the ſubſiſtence, unleſs the magiſtrate *owner is reſponſible for the ſame:*

" given, making the ſame a debt upon the owner of the animals," plainly implies that the finder will have no claim upon the owner for ſuch ſubſiſtence, upon his appearing at a time when the trove has not yet been ſold, unleſs the magiſtrate, in his decree, direct that " he " ſhall have ſuch a claim upon him;"—but if the magiſtrate ſhould not thus have rendered the ſubſiſtence a debt upon the owner, the finder would have no claim upon him for it:—this is approved doctrine. Some ſay that the finder has a claim upon the owner for the ſubſiſtence, where he furniſhes it by order of the magiſtrate, whether the magiſtrate may have explicitly declared the ſame to be a debt upon the owner or not.

but he may detain the trove from the owner until he be paid for the ſubſiſtence:

Upon the owner appearing, the finder is at liberty to detain the trove, until he pay him for the ſubſiſtence; becauſe the finder has preſerved the trove, and kept it alive, by ſubſiſting it. The caſe is therefore the ſame as if the owner had obtained his *right of property* through the finder; and conſequently the trove reſembles an article of ſale; that is, in the ſame manner as the ſeller is entitled to detain the article ſold until the purchaſer produce the price, ſo alſo, the finder is entitled to detain the trove until the owner produce an equivalent for the ſubſiſtence. The finder, moreover, reſembles a perſon who apprehends and brings back a fugitive ſlave, that is, in the ſame manner as that perſon is entitled to detain the ſlave on account of a recompenſe (ſince it may be ſaid that *he has preſerved him*) ſo alſo, the finder is at liberty to detain the trove on account of the ſubſiſtence to be afforded to it, ſince he has thus preſerved it alive.

if, however, the trove periſh in the finder's poſſeſſion, *after* detention, he has no claim.

It is to be obſerved that the debt for ſubſiſtence is not extinguiſhed by the circumſtance of the trove periſhing in the hands of the finder, *before* his detention of it: but it is extinguiſhed by the trove periſhing in his hands *after* detention, becauſe by *detention* it is placed in the ſame ſtate as a *pledge*, and as debt is extinguiſhed by the deſtruction of the pledge, ſo in the ſame manner the debt for ſubſiſtence is extinguiſhed by the trove periſhing after detention.

lawful ar-
ticles are to
be advertiſed
and
[illegible]
thoſe of
ful articles.

Troves of *lawful* articles and of *unlawful* are the ſame, in this reſpect, that the finder is to advertiſe them for a year. *Shafëi* contends that an *unlawful* article is to be advertiſed until the owner appear, becauſe the prophet has declared "*A trove of a* FORBIDDEN *thing is not lawful to any but the* MOONSHID," (that is, the *claimant* or the *owner*;)—and it thus appearing that the trove is unlawful to any except the owner, it is indiſpenſable that the finder advertiſe it until the owner appear, and he reſtore it to him; for it muſt not be beſtowed in *alms*. The arguments of our doctors upon this point are twofold:—FIRST, the prophet has ſaid, "*Advertiſe the trove by its marks*[*], *and then continue to advertiſe it for a year*," in which no diſtinction is made between a *lawful* article and an *unlawful*:—SECONDLY, the unlawful article in queſtion is a *trove*; and if, after the expiration of the term of advertiſement, it be beſtowed in alms, the owner's right of property in it ſtill continues in force[†];—and ſuch being the caſe, the finder may beſtow it in alms, after the expiration of the term aforeſaid, in the ſame manner as any other *troves*.—With reſpect to the ſaying quoted by *Shafëi*, the explanation of it is, that a trove of a *forbidden* thing is lawful only to the *Moonſhid*, (that is, to the *advertiſer*, or *perſon* who makes *notification* of it,) and that it is not lawful for any perſon to take it for his *own* uſe[‡]. A trove of a *forbidden* thing is particularly adverted to in this ſaying, becauſe ſuch a trove muſt be advertiſed, although it appear to be the property of *ſtrangers*, (who are continually paſſing through the country,) and if it were not for ſuch an injunction, people might apprehend that, as being the property of ſtrangers who will probably never return to demand it, the advertiſing is uſeleſs.

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[*] Literally, "*advertiſe the* BAG *or* PURSE *containing the trove*,—*and its* TYING,—*and then advertiſe the* TROVE *for a* YEAR."

[†] As he ſtill has a claim of reſtitution. (See p. 269.)

[‡] The difference here turns ſolely upon the ſenſe in which the term *Moonſhid* is to be taken. *Moonſhid* literally ſignifies *a perſon who points to the place where any thing is loſt*,—a deſcription which applies equally to the *loſer* or the *finder*. *Shafëi* takes it in the *former* ſenſe, and *Haneefa* in the *latter*.

The claimant of a trove muſt prove his right by evidence: but it may be delivered to him upon his deſcribing the *tokens* of it: in this caſe, however, the magiſtrate cannot *compel* a ſurrender.

If a perſon appear, and lay claim to a trove, it is not to be given to him until he produce evidence. If, however, the claimant deſcribe the tokens of the trove, by mentioning the weight of the *dirms*, (for inſtance,) or the purſe in which they are contained, and its tying, it may be lawfully given to him:—but the magiſtrate is not to uſe any *compulſion* upon this point. *Malik* and *Shafeï* allege that the magiſtrate may *compel* the finder to give up the trove; becauſe he merely diſputes with the claimant the *poſſeſſion* of the trove, and not the *right of property* in it; and ſuch being the caſe, a deſcription of the *tokens* is made a condition, as the parties diſpute concerning the *poſſeſſion*, but the production of evidence is not made a condition, as they do not diſpute concerning the *right of property*. The argument of our doctors is that *poſſeſſion* or *ſeizin* is a right which may be deſirable, in the ſame manner as actual *property* in a thing, wherefore no perſon is entitled to claim the *poſſeſſion* of it but through *proof*, that is, through *evidence*, in the ſame manner as no one is entitled to claim the *property* in it, but through evidence:—but yet it is lawful for the finder to ſurrender the trove to the claimant, upon his deſcribing the tokens, becauſe the prophet has ſaid "*If the owner appear, and deſcribe the* "*thing which contains the trove, and the quantity of the contents, let* "*the finder ſurrender it to him*;"—that is, it is *allowable* to ſurrender it to him; for the ordinance here is merely of a *permiſſive* nature, ſince it appears, in the *Hadees Maſhhoor*, that *the claimant muſt produce evidence, and the defendant muſt ſwear*,—which evinces that the command contained in this ſaying is of a *permiſſive* and not of an *injunctive* nature, otherwiſe it would not be incumbent upon the claimant to produce evidence.

The finder ſurrendering a trove upon

When the claimant deſcribes the tokens of the trove, without producing evidence, and the finder ſurrenders it to him, it is incumbent on the finder to take ſecurity from him out of caution*; and concerning this point there is no difference of opinion (according to the *Rawâyet Saheeh*) becauſe here the finder requires the ſecurity for *himſelf*†. This is contrary to the caſe of ſecurity required in behalf of an *abſentee heir*;—that is, where the *Kâzee* diſtributes the effects of a perſon deceaſed among ſuch of his heirs as are preſent,—in this caſe there is a difference of opinion concerning his requiring ſecurity of the *preſent* heirs, in behalf of an *abſent* heir, provided ſuch ſhould hereafter appear,—for, according to *Haneefa*, ſecurity is not required in behalf of the abſentee heir,—but according to the two diſciples ſecurity is ſo required.

deſcription of the toke-- without from the claimant.

The finder is not to be *compelled* to ſurrender the trove, although he ac- the claimant.

If any perſon claim a trove, and the finder verify his claim, yet ſome ſay that the *Kâzee* muſt not *compel* him to ſurrender the trove;—ſimilar to the caſe of an agent empowered to take poſſeſſion of a depoſit; in other words, if any perſon plead that "he is an agent "empowered to take poſſeſſion of a depoſit from ſuch a perſon," and the *truſtee* verify his declaration, yet he is not *compelled* to ſurrender the *depoſit* to the agent; and ſo here likewiſe. Some, on the contrary, ſay that compulſion may be uſed, becauſe in the caſe in queſtion, the owner is a perſon unknown, whereas, in the caſe of a *depoſit*, the owner of the depoſit is a perſon who is *known*, whence the poſſeſſor cannot be *compelled* to ſurrender it to the agent, he not being the *owner*.

A trove cannot be beſtowed in alms

The finder muſt not beſtow the trove in alms upon a *rich* perſon, becauſe the prophet has ſaid, "*If no owner of a trove property appear,*

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[*] Leſt another perſon ſhould afterwards appear, and prove the trove to belong to him, by *evidence*.

[†] He takes the ſecurity in his own behalf, and not in behalf of any future poſſible claimant, who, if he ſhould appear, has recourſe to *him* for reſtitution.

a *rich* on;

"BESTOW IT IN ALMS;"—and it is not lawful to beſtow alms upon an *opulent* perſon; a trove, therefore, reſembles *Zakât*.

the finder (if *rich*) lawfully con- it to his uſe.

If the *finder* be in opulent circumſtances, it is not lawful for to derive any advantage from the trove. *Shafeï* affirms that this is lawful, becauſe the prophet ſaid to *Yewâbee*, who had found an hundred *deenârs*, "*If the owner come, ſurrender the trove to him; but if not,* "*make uſe of it*;—and yet *Yewâbee* was in opulent circumſtances. Moreover, the uſe of the trove is allowed to the finder, where he happens to be in indigent circumſtances, only in order that this permiſſion may be a *motive* to him to take up the trove, in ſuch a manner that it may be preſerved; in other words, the finder, in hope of this advantage, will take up the trove from the ground, and it will thus be preſerved from periſhing. Now, the *poor* and the *rich* are both alike in this particular; and conſequently, the finder who is *rich* may lawfully convert it to his own uſe, in the ſame manner as one who is *poor*. The argument of our doctors is that a *trove* is the property of *another*, and hence it is not allowable to derive an advantage from it without his permiſſion, becauſe the paſſages in the ſacred writings which prohibit the enjoyment of another's property are *generally* expreſſed.—The uſe, moreover, is permitted to the *poor*, (contrary to what *analogy* would ſuggeſt,) in conſequence of the ſaying of the prophet already mentioned, and of the opinion of all the doctors; and therefore, any *others* than thoſe remain under the *original* predicament, which is an *inhibition* of the uſe.—With reſpect to what *Shafeï* urges, (that "the uſe of the trove is allowed to the finder where he "happens to be in indigent circumſtances, only in order that this "permiſſion may be a motive to him to take up the trove, ſo that "it may be preſerved, in which particular the *rich* and the *poor* are "both alike,")—we reply that this reaſoning is not admitted; becauſe a *rich* perſon may ſometimes take up a trove from the ground under the idea that he may himſelf poſſibly become a *pauper* within the term preſcribed for advertiſing; and a *poor* perſon, on the other hand, may ſometimes neglect to take up a trove, under the idea that he may, poſſibly, become *rich* within that term; what *Shafeï* urges, therefore, under this idea, is no ground of argument. With reſpect to the inſtance adduced of *Yewâbee*, it is to be conſidered that he converted the trove to his own uſe by permiſſion of the *Imâm*; and the uſe of a trove, by permiſſion of the *Imâm*, is lawful.

The finder, if *poor*, may convert the trove to his own uſe; or, if *rich*, may beſtow it upon his poor relation.

If the finder of a trove be *poor*, he need not heſitate to make uſe of the trove*, ſince in ſuch a diſpoſal of it a kindneſs is performed both to the *owner* and to the *finder* †.—Upon the ſame principle, alſo, it is lawful to beſtow it upon any *other* poor perſon: thus if the finder be *rich*, and his parents, children, or wives *poor*, he may beſtow the trove in alms upon them, for the reaſon above alleged.

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* After having duly advertiſed it, as before directed.

† Becauſe the *finder* thus obtains a relief from his wants, and the owner has the merit of the charity.

HEDÄYA.

BOOK XII.

Of IBBÂK, or the Abſconding of SLAVES.

Diſtinction between a ſlave

AN abſconded male or female ſlave is termed *Abik*, or *fugitive*; but an *infant* ſlave, who wanders away in conſequence of want of underſtanding, is termed *Zâl*, or *ſtrayed*, and not *fugitive*.

It is laudable to apprehend a fugitive

THE apprehending of a fugitive ſlave is laudable with reſpect to thoſe who are enabled to apprehend him, becauſe this gives life to the owner's right, ſince a fugitive ſlave is the ſame as one who is *dead* with reſpect to his *owner*. With reſpect to *ſtrayed* ſlaves, ſome ſay that the taking of them is alſo laudable; but others, on the contrary, maintain that it is laudable to let them go, ſince it is moſt probable that ſuch a one will not wander *far*, and conſequently, that the owner will recover him*.

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* Without being ſubjected to the expence of a *Joâl*, or reward, for the recovery of him.

The perſon who ſeizes an abſconded ſlave muſt bring him before the *Sultan**, he not being of *himſelf* equal to the charge of him: contrary to the caſe of a *trove*, which any perſon is equal to the care of. And upon this perſon delivering the ſlave to the *Sultan*, he [the *Sultan*] muſt impriſon him:—but if a perſon deliver a *ſtrayed* ſlave to the *Sultan*, he muſt not impriſon him;—becauſe no confidence can be placed in a *fugitive* ſlave, as it is to be apprehended that he may again abſcond: contrary to one who is only *ſtrayed*.

and he muſt be taken before the Sultan, who muſt impriſon him.

If a perſon, having ſeized and brought a fugitive ſlave from the diſtance of three days journey, or upwards, deliver him to his maſter, it is incumbent upon the maſter to pay that perſon the *Joál*, or reward, which is *forty* DIRMS. And if he have apprehended and brought him from a diſtance *ſhort* of three days journey, he is entitled to a proportional recompence. This is upon a favourable conſtruction. Analogy would require that nothing whatever be due to him, except where it has been ſtipulated before-hand; (and ſuch is the opinion of *Shafeï*;) becauſe the perſon in queſtion, in ſeizing and bringing back the ſlave, has acted *gratuitouſly*. Thus the caſe reſembles that of a *ſtrayed* ſlave; in other words, as nothing is due to a perſon who reſtores a *ſtrayed* ſlave to his maſter, (becauſe of this being a *gratuitous* act,) ſo in the ſame manner nothing is due for the *fugitive* ſlave where he is reſtored to his maſter, for the ſame reaſon. The reaſons for a more favourable conſtruction of the law upon this point are threefold:—FIRST, the companions all agree that a reward is due; ſome of them, however, contend that this reward is *forty* DIRMS, whilſt others ſay that it is *leſs* than forty; and hence it is that we ſay *forty* DIRMS are due in a caſe of diſtance of three days journey, and *leſs* than forty, where the diſtance is *ſhort* of three days, in order that the different rates [eſtabliſhed by the

The reſtorer of a *fugitive* ſlave is entitled to a reward of

or leſ portion to the diſtance from

brought, within three days journey:

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* By this term it is always to be underſtood the *ſovereign*, or *chief magiſtrate*.

companions] may be thus reconciled:—SECONDLY, if a reward be made incumbent, men's property will be ſecured, becauſe people will ſeize fugitive ſlaves and reſtore them to the owners, in hopes of the reward;—for the performance of acts merely from a motive of *conſcience* ſeldom occurs in the world, more eſpecially in the *preſent* times:—(the rating the premium at forty *dirms*, *or leſs*, is grounded upon oral teſtimony*; but no report has reached us concerning *ſtrayed* ſlaves, and hence, in their caſe, nothing is declared to be due:)—THIRDLY, in the inſtance of *ſtrayed* ſlaves the neceſſity of conſervation is leſs urgent than in the caſe of *fugitive* ſlaves, becauſe a ſtrayed ſlave does not *conceal* himſelf,—whereas a fugitive ſlave endeavours to keep concealed; a *fugitive* ſlave, therefore, is eſſentially different from a *ſtrayed* ſlave; and hence a premium is eſtabliſhed in the caſe of the *former*, and not in the caſe of the *latter*. As to what was before advanced, (that, "if a perſon apprehend and bring back a fugitive "ſlave, from a diſtance ſhort of three days journey, he is entitled to "a proportional recompence,"—(it is to be obſerved that if the ſervice be calculated at the rate of value of the eſtabliſhed premium, there will be thirteen *dirms* and one third of a *dirm* due for each day invariably, which is what ſome have alleged. The beſt method, however, is to refer this point to the diſcretion of the magiſtrate, or to leave it to the parties themſelves, (namely, the *reſtorer* of the ſlave and the *owner*,) in which caſe the reſtorer is entitled to whatever ſum they may agree upon.

but no reward is due to the reſtorer of a *ſtrayed* ſlave.

Rule where the *value* of the ſlave falls ſhort of forty [illegible]

IF the value of the fugitive ſlave be *ſhort* of *forty* DIRMS, the owner muſt be directed to pay to the reſtorer *thirty-nine* DIRMS, provided he have ſeized and brought him back from a diſtance of three days journey.—Our author remarks that this is the opinion of *Mohammed*.—*Aboo Yooſaf* maintains that he is entitled to *forty* DIRMS, becauſe, as the rate is ſo eſtabliſhed upon the authority of the ſacred writings *, it cannot be leſſened; whence it is that if the reſtorer of the ſlave and the owner were to enter into a compoſition at a rate *above forty* DIRMS, it would be unlawful;—but if, on the contrary, they agree for *fewer* than *forty*, it is lawful, becauſe as the reſtorer is at liberty to decline accepting of *any part* of the forty *dirms*, it follows that he may lawfully accept of *leſs* than that ſum. The argument of *Mohammed* is that the deſign, in eſtabliſhing a reward, is to excite and encourage men to reſtore fugitive ſlaves to their owners, in order that the proprietor may recover his property; and hence *one* DIRM is deducted, in order that *ſome part* of the fugitive may remain for his maſter, and that the advantage of inſtituting a reward may be aſcertained †.

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* This phraſe is applied (in law language) to any thing which is not founded either upon the text of the *Koran*, or the ordinances of the prophet.

A reward is due for *Am-* and *Modabbirs* provided they be reſtored before the owner's death;

AM-WALIDS and *Modabbirs* are, with reſpect to the *reward*, conſidered in the ſame light as *abſolute ſlaves*, provided they be reſtored before the demiſe of their owner, becauſe ſlaves of the above deſcriptions are a *property* to their owner, and the reſtoration of them is a *vivification* of them with reſpect to him; the reward, therefore, is due:—but where they are reſtored after the owner's deceaſe, no part of the reward is due, becauſe ſlaves of both the above deſcriptions are free upon the demiſe of their maſter: contrary to the caſe of *abſolute* ſlaves, ſince they do *not* become free upon their maſter's death, for which reaſon the reward for reſtoring them is due, although they be reſtored *after* the maſter's deceaſe.

and for *abſolute* ſlaves, although they be not reſtored unti death.

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* This apparently contradicts what was before mentioned, that *the rating of the premium at forty* DIRMS, *or leſs*, *is grounded upon* ORAL TESTIMONY: the *oral teſtimony* however relates ſolely to the additional words, *or leſs*.

† The doctrine of *Mohammed*, as ſtated in the caſe in queſtion, is according to the *Perſian* verſion of the *Hedâya*. The tranſlator, conceiving it his duty to adhere cloſely to his text, has not ventured to alter it. The paſſage, however, is much more clearly expreſſed in the *Arabic* copy, and in a way to which the reaſoning of *Mohammed* is directly applicable (which is not the caſe *here*:)—It ſimply ſays " *If the value of the ſlave be ſhort of forty* DIRMS, *let the reſtorer be decreed the value*, *except a* DIRM."

There is no reward for a (living in the

If the *father*, or the *ſon* of the owner, living in the ſame family, reſtore a fugitive ſlave, no reward whatever is due; (and the ſame rule obtains where, of a huſband and wife, either reſtores a fugitive ſlave to the other;) becauſe, it is cuſtomary for ſuch relations to act gratuitouſly towards each other.

The death of the ſlave in the hands of the perſon occaſion reſponſibility: but the taker is not entitled to a reward.

If a fugitive ſlave abſcond from the hands of the perſon who apprehended him, or die whilſt in his poſſeſſion, no indemnification whatever is due from him to the owner, becauſe the ſlave is a *truſt* in his hands. This, however, obtains only where the perſon who took him has called people to witneſs that "he ſeized ſuch a ſlave, "with a view of reſtoring him to the ower,"—(in the manner already mentioned in treating of *troves.*)—In the caſe here ſuppoſed, no reward whatever is due to the perſon who apprehended the ſlave, becauſe *he* ſtands in the predicament of a *ſeller*, and the *maſter* of the ſlave ſtands as a *purchaſer*; (whence the former is at liberty to detain the ſlave on account of the reward, in the ſame manner as a ſeller is at liberty to detain the article ſold, until he receive the price;) and ſuch being the caſe, no part of the reward is due to the perſon who takes the ſlave, in the ſame manner as no part of ſeller, where the article ſold periſhes in his hands.

The reward cannot be

If the maſter of a fugitive ſlave emancipate him on the inſtant of his being brought to him, and before the perſon who took him has delivered him up, he is conſidered as being ſeized of the ſlave at the moment of emancipation, in the ſame manner as where the purchaſer of a ſlave emancipates him before ſeizin, in which caſe he is conſidered as having taken poſſeſſion of him on the moment of emancipation: and upon the ſame principle, if the maſter of the ſlave *ſell* him to the perſon who apprehended him, he is conſidered as being ſeized of him on the inſtant of ſale, on account of his thus ſecuring to ſelf a recompence for the ſlave in the *price* of him.

The taker muſt declare, to witneſſes, his deſign in ſeizing the ſlave,

or he is not entitled to the reward.

It is incumbent upon the perſon apprehending a fugitive ſlave to call ſome perſons to witneſs that "he takes this ſlave in order to reſtore him to his maſter." It is moreover to be obſerved that it is incumbent upon the taker (according to *Haneefa* and *Mohammed*,) thus to call witneſſes *at the time of his taking the ſlave*; inſomuch that if a perſon reſtore the ſlave to his maſter *without* having called people to witneſs at the time of ſeizing him, he is not entitled to any reward; becauſe his neglecting to call witneſſes argues that he has taken the ſlave for *himſelf*; and the caſe is conſequently the ſame as if a man were to purchaſe the ſlave from the perſon apprehending him,—or to accept of him, from the ſame perſon, as a gift,—or, as if the ſlave had deſcended to him from the ſame perſon by inheritance,—and this man, ſo poſſeſſing him by purchaſe, gift, or inheritance, then reſtore the ſlave to his owner, in which caſe no reward is due to him, becauſe he here reſtores the ſlave to the proper owner *for his own advantage*; in other words, in conſequence of getting poſſeſſion of the ſlave he becomes reſponſible for him, and by returning him to his owner he is diſcharged from the reſponſibility; his returning him, therefore, with a view to diſcharge himſelf from reſponſibility, is in fact returning him with a view to *his own advantage:* no reward, therefore, is due to him,—unleſs, at the time of purchaſe, he had called ſome perſons to witneſs that "he purchaſed this ſlave with a view to reſtore him to his owner," in which caſe the reward is due to him· but the *purchaſer*, in this inſtance, is conſidered as having acted *gratuitouſly* in paying a price for the ſlave *.

The for t *pawned* fugitive ſlave is due from the *pawnee.*

If the fugitive ſlave be *in pawn*, the reward for reſtoring him is due from the perſon detaining him in pawn; becauſe the reſtorer has given life to the property involved in the ſlave by bringing him back; and the property involved in him is the right of the perſon to whom he is pawned, ſince it is only through means of this property that he can recover what is due to him: the reward, therefore, is due from the perſon who has him in pawn,—and this whether the ſlave be reſtored during the life of the pawner, or after his deceaſe, becauſe a contract of pawn is diſſolved by the deceaſe of the *pawner.* This is where the *value* of the ſlave does not exceed the debt of the pawner: but if the value exceed the debt, the reward is due from the perſon who has him in pawn, to the amount of the debt, and the remainder from the *pawner*, becauſe the right of the creditor who receives a pawn extends only to what it involves. The reward, therefore, is ſubject to the ſame rule with the price of *medicine*, or quittance for an offence;—that is to ſay, if a pawned ſlave fall ſick, and medicine be purchaſed for him, the price for the medicine is due from the perſon having him in pawn to the amount of the debt involved in the ſlave, and the remainder from the *pawner*, where the value of the ſlave exceeds the debt;—and in the ſame manner, if a pawned ſlave commit an offence, it is incumbent upon the creditor who has him in pawn to pay the quittance of offence to the amount of the debt involved in the ſlave, and thus releaſe him, the *pawner* paying the remainder; and the ſame in the caſe here treated of.

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* And conſequently, the purchaſer has no claim upon the proprietor for the *price* he has paid.

Caſe of a fugitive ſlave *involved in debt.*

If a fugitive ſlave be involved in debt, the reward for apprehending him is due from his owner, where *he* chuſes to diſcharge the debts: but if the owner do not chuſe this, the ſlave is to be ſold for the diſcharge of the debts,—the reward to be previouſly paid out of the *price* for which he is ſold, and the remainder afterwards diſtributed among his creditors; becauſe the *reward* is an expence attendant upon the *right of property*; and the right of property in the ſlave reſembles a *ſuſpended* property, as it is held in ſuſpenſe between two parties; (ſince, if the maſter chuſe to defray the debts, the right of property reſts with *him*,—or, if he prefer *ſelling* the ſlave, it reſts with the *creditors*;) and the *right of property* thus remaining in ſuſpenſe, that which is an expence attendant upon the right of property

(namely

(namely the *reward*) alſo remains in ſuſpenſe;—the reward, therefore, is incumbent upon him in whom the right of property reſts.

Caſe of a fugitive ſlave liable to fine for an offence.

If a male or female fugitive ſlave commit an offence, the reward for apprehending is incumbent upon the maſter, provided he agree to pay the *Fiddeeya Jánâyat*, or quittance of offence, becauſe the advantage of the ſlave reſults to his maſter: but if he prefer ſurrendering him to the party aggrieved, (or avenger of the offence,) the reward in this caſe is due from the party to whom the advantage of the ſlave accrues.

Caſe of a *gift*-ſlave abſconding from the

If a perſon make a gift of a ſlave to another, and the other take poſſeſſion of him, and the ſlave abſcond from the *donee*, and a *third* perſon ſeize and reſtore him to the *donee*, the reward is due from the *donee* although the *donor* reſume his ſhare from the *donee* after reſtoration; becauſe it is not in conſequence of the reſtoration to the *donee* that the advantage of the ſlave accrues to the *donor*, [after reſumption,] but rather in conſequence of the *donee* not having diſpoſed of the ſlave in any way after reſtoration,—ſince, if the *donee* had ſo diſpoſed of him, (by *manumiſſion*, *ſale*, or ſo forth,) the reſumption could not have

The guardian of an *infant* or *orphan* is not entitled to any reward for reſtoring a fugitive ſlave.

If the maſter of a fugitive ſlave be an *infant*, the reward is due from his property, becauſe the reward is an expence attendant upon the right of property. If, however, the reſtorer of the ſlave be the infant's *guardian*, no reward whatever is due to him, becauſe he is *manager* of the infant's concerns, and conſequently it is his *duty* to ſeek after and recover the ſlave. In the ſame manner, alſo, if an *orphan* be reſident in any perſon's family, and this perſon ſeize and reſtore a fugitive ſlave belonging to the orphan, no reward whatever is due to him, as it is his duty to ſeek for and reſtore the ſlave. In the ſame manner, moreover, no reward is due to the *Sultan* where he reſtores a fugitive ſlave to the owner.

HEDÀYA.

BOOK XIII.

Of MAFKOODS, or MISSING PERSONS.

Definition of *Mafkood*.

MAFKOOD, in its literal ſenſe, means *loſt* and *ſought after*. In the language of the LAW it ſignifies a perſon who diſappears, and of whom it is not known whether he be *living* or *dead*, or where he reſides.

When a perſon diſappears, the *Kâzee* muſt appoint a truſtee to manage his

If a perſon diſappear, and it be not known whether he be *dead* or *alive*, or where he reſides, the *Kâzee* muſt appoint ſome perſon to look after his property, and to manage his affairs, and maintain his rights; becauſe the *Kâzee* is appointed for the purpoſe of attending to the intereſts of all ſuch as are unable to attend to their own concerns; and as a *miſſing perſon* is of this deſcription, (whence he ſtands in the ſame predicament with an *infant* or an *ideot*)—it is for his intereſt to appoint a perſon to look after his property and manage his affairs.—By what is above ſtated, that "the perſon appointed by the *Kâzee*

“ ſhall *maintain the rights* of the miſſing perſon,” is meant that this perſon ſhall take poſſeſſion of all acquiſitions ariſing to the *miſſing perſon* from his tenements, lands, or effects, and alſo of ſuch debts as are acknowledged by his debtors;—and that he ſhall alſo proſecute for debts owing in conſequence of contracts entered into by *himſelf*[*] and which are diſputed by the debtor, as the rights of the contract appertain to him, he being the *contractor*:—but he is not to proſecute on account of debts owing in conſequence of any contract entered into by the *miſſing perſon*, and which are diſputed by the debtors; nor can he proſecute for the *miſſing perſon*'s ſhare in *lands* or *effects*, in the hands of a third perſon, who diſputes the ſame; becauſe he is neither the *principal*, nor the *deputy* of the principal, being no more than merely an *agent for ſeizin* on the part of the *Kâzee*, who is not empowered to proſecute, according to the united opinion of our three doctors;—for their only difference of opinion is with reſpect to an agent for ſeizin appointed by the proprietor himſelf, in a caſe of debt, whom *Haneefa* holds to be empowered to proſecute, whereas the two diſciples deny him this power.—The reaſon of this is that if it were lawful for the *Kâzee*'s agent for ſeizin to proſecute, and he were to proſecute accordingly, and the debtor to produce evidence proving that the *miſſing perſon* had already received the debt, or diſcharged it, the *Kâzee* muſt neceſſarily paſs a decree accordingly, and this would be a decree againſt an abſentee, which is unlawful.—It is not lawful for him, therefore, to proſecute, except where the *Kâzee* is of opinion (with the ſect of *Shafeï*,) that it is lawful to paſs a decree againſt an abſentee, and he directs accordingly, in which caſe it is lawful, becauſe a decree is of force where it is paſſed in any caſe concerning which there is a difference of opinion[†].

to him;

but cannot proſecute for diſputed debts,

or depoſits.

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[*] On behalf of the *Mafkood* or miſſing perſon.

[†] That is, where the *Kâzee* may happen to diſſent in opinion from the *Haneefite* The *Arabic* copy ſimply ſays “ in which *caſe it is lawful, becauſe the* KA- *to be poſſeſſed of judgment and learned in the* LAW.” What is here

Objection.—The point upon which the difference of opinion reſts, on the preſent occaſion, is the *decree itſelf*; and hence the caſe requires that the validity of the decree be ſuſpended upon the warranty of another *Kâzee*[*].

Reply. The *decree itſelf* is not what the difference of opinion reſts upon in the preſent inſtance, but the *cauſe* of the decree, namely, the *evidence*, the point of difference being, merely, whether evidence, where there is no actual proſecutor, amounts to proof?—and where the *Kâzee* is of opinion that the evidence amounts to proof, and directs accordingly, his decree is legal and valid.

The *miſſing perſon's* periſhable effects muſt be ſold;

—It is to be obſerved that, if there be, among the effects of the miſſing perſon, articles of a periſhable nature, (ſuch as *fruit*, and ſo forth) the *Kâzee* muſt ſell them; becauſe, as the preſervation of them both in *ſubſtance* and in *effect* is impracticable, they are to be preſerved in *effect*. But he is not to ſell any articles not liable to periſh, either on account of ſubſiſtence, or for any other purpoſe; becauſe the *Kâzee* is inveſted with authority, with reſpect to an abſentee, for the *conſervation of his property*, and hence it is incumbent upon him to preſerve it in *ſubſtance* where that is practicable.

but not thoſe which are *un*periſhable.

Subſiſtence muſt be afforded, out of

and *children* of the *miſſing perſon*; and to

a decree, were entitled to it during his preſence.

The *Kâzee* is to give ſubſiſtence to the wife and children of a *miſſing perſon* out of his property. This rule is not reſtricted to his *children*, but extends to all related to him in the line of paternity, ſuch as the father, the grandfather, the ſon's ſon, and ſo forth; for it is a rule that every perſon entitled to a ſubſiſtence from property of the *miſſing perſon* whilſt he was preſent, independent of an order from the *Kâzee* (ſuch as his infant children, and adult daughters, or adult ſons who are diſabled) muſt in his abſence be

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here advanced affords a ſtriking inſtance of the power of a *Kâzee*, and the latitude allowed to him in paſſing his decrees.

[*] Becauſe this *Kâzee* being himſelf a repreſentative of the *Mafkood*, or miſſing perſon, and conſequently a party concerned in the decree, cannot carry it into effect, without ſuch authority.

furniſhed with a ſubſiſtence, out of his property, by the *Kázee*:—but to thoſe who, whilſt the miſſing perſon was preſent, had no right to ſubſiſtence independent of an order from the *Kázee*, (ſuch as brothers, ſiſters, or maternal uncles or aunts,) no ſubſiſtence is, in his abſence, to be furniſhed by the *Kázee*, becauſe theſe are entitled to a ſubſiſtence only *through a decree*, and a decree againſt an abſentee is illegal. By the *property* of the miſſing perſon, as here mentioned, is meant *money*, becauſe the right of the above perſons is *meat* and *clothing*, and where thoſe are not to be found among the miſſing perſon's effects, there is a neceſſity for the *Kázee* to decree the *value*; and the *value* conſiſts of *caſh*. Bullion (that is, uncoined gold and ſilver) is in this reſpect ſubject to the ſame rule with *caſh*, ſince that alſo admits of being given as value, in the ſame manner as *caſh*. This is where the *Kázee* has money in his hands. If, however, there be no money in his hands, but there happen to be ſome in truſt, in the hands of anothe perſon,—or a debt owing from ſome other perſon, the *Kázee* is in that caſe to provide the ſubſiſtence from ſuch depoſit or debt, where the truſtee or debtor acknowledges the *depoſit* or *debt*, and alſo the *marriage* or *parentage*. This acknowledgment, however, is neceſſary only where theſe points are not fully known to the *Kázee*; for if they be fully known to him, the acknowledgment is not requiſite.—If, on the other hand, ſome of theſe points be known, ſuch as the *debt* and the *depoſit*,) and others unknown (ſuch as the *marriage* or the *parentage*)—or *vice verſa*, in this caſe the acknowledgement is requiſite with reſpect to that which is *unknown*: this is approved. If the truſtee or debtor furniſh the ſubſiſtence without an order from the *Kázee*, the truſtee is reſponſible for ſuch diſburſement, and the debtor is not diſcharged from his debt, becauſe in ſo doing they have not paid any thing either to the owner or to his repreſentative: contrary to where they furniſh ſubſiſtence by order of the *Kázee*, becauſe he appears as repreſentative of the owner.

Where there
from *debts*, or *depoſits*, the
perſon.

IF the truſtee or debtor *deny* the depoſit or debt, together with the marriage and parentage, or if they deny the marriage and parentage only, in this caſe the perſons entitled to ſubſiſtence cannot be admitted, as plaintiffs, to prove and eſtabliſh thoſe points which the truſtee or debtor denies; becauſe a claim is not admitted, unleſs it be laid againſt either the *principal*, or his *repreſentative*; and the principal, in the preſent inſtance, is abſent; and the debtor or truſtee are not either *actually* or *virtually* his repreſentatives:—they evidently are not *actually* ſo, becauſe he has not conſtituted any perſon his agent; nor are they *virtually* ſo, becauſe, in the proſecution of the plaintiff's claim againſt the abſentee, the ſpecification of the *occaſion* * of the claim is no good plea for the eſtabliſhment of his right,—(namely, ſubſiſtence from the property in the debtor's or truſtee's hands,)—ſince, in the ſame manner as ſubſiſtence is due from *that* property, it is alſo due from *any other* property belonging to the miſſing perſon:—the debtor or truſtee are therefore not *virtually* the miſſing perſon's repreſentatives.

The *Kâzee* cannot effect a ſeparation [illegible] and his wife.

The *Kâzee* is not empowered to effect a *ſeparation* between a miſſing perſon and his wife. *Mâlik* maintains that, at the expiration of four years, the *Kâzee* may pronounce a ſeparation, after which the wife is to obſerve an *edit* of four months and ten days, ſuch being the *edit* of widowhood,—and ſhe may then marry whoever ſhe pleaſes; becauſe *Omâr* thus decreed with reſpect to a perſon who diſappeared from *Medina*; and alſo, becauſe a miſſing perſon, by his abſence, obſtructs the woman's right:—the *Kâzee*, therefore, muſt pronounce a ſeparation between the parties after the lapſe of a certain time, becauſe of the analogy this caſe bears to that of *Aila*, or of *impotence*;—that is to ſay, in the ſame manner as, in a caſe of *Aila*, an irreverſible divorce takes place at the end of four months [*], on account of the huſband, by *Aila*, obſtructing his wife's right,—and in the ſame manner alſo as, in a caſe of impotence, the *Kâzee* pronounces a ſeparation [†] at the end of a year, on account of the huſband thus obſtructing his wife's right,—ſo likewiſe, in the caſe in queſtion, the *Kâzee* muſt pronounce a ſeparation, for the ſame reaſon:—and the caſe of *abſence* being equally analagous to a caſe of *Aila* and of *impotence*, the length of the term is adjuſted with a regard to *both*, by adopting the number *four* from *Aila*, and the term *year* from impotence, ſo as to make practice in *this* particular accord in the ſame manner with the other two. The arguments of our doctors upon this point are twofold.—FIRST, the PROPHET once declared, with reſpect to the wife of a miſſing perſon, "*She is his wife until ſuch time as his* DEATH "*or* DIVORCE *ſhall appear:*" and *Alee* alſo ſaid, with reſpect to the wife of a *Maſkood*, "She is a *mourner*, wherefore ſhe muſt be patient, "until ſhe be perfectly informed of his death, or of his having "divorced her."—SECONDLY, the exiſtence of the marriage is notorious; and as the mere *diſappearance* of the huſband is not a ſufficient cauſe of ſeparation, and his death is a matter of uncertainty, it follows that the marriage cannot be diſſolved, becauſe of the *doubt*. With reſpect to the authority of *Omar*, as cited by *Mâlik*, we reply that he afterwards adopted the opinion of *Alee*.—As to what he farther urges reſpecting the analogy between the caſe in queſtion, and a caſe of *Aila*, it is not admitted; becauſe *Aila*, in times of ignorance, was an *immediate* divorce, but the law afterwards conſtituted it a *deliberate* divorce [‡], and *hence* it is that *Aila* occaſions a ſeparation [§].—In the ſame manner alſo, the analogy urged by him between the caſe in queſtion and a caſe of *impotence* is not admitted;—becauſe where a

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* Meaning, the circumſtance of "*the truſtee or debtor having property belonging to the miſſing perſon in his hands*," which is not admitted as a plea on behalf of the plaintiff, ſince his ſubſiſtence is equally due from any *other* part of the miſſing perſon's property.

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[*] See vol. I. p. 306.

[†] See vol. I. p. 354.

[‡] *Arab. Talâk Mowjil*, meaning a divorce which is to take place *within a certain time*.

[§] That is to ſay, it is for *this* reaſon, and *not* becauſe of the huſband obſtructing his wife's right, as ſuppoſed by *Mâlik*.

huſband *diſappears*, it is poſſible that he may re-appear, whereas it is not poſſible that an impotent perſon ſhould recover his virility, after his impotence has continued for above a year.

The miſſing perſon is to be declared a *de-*

WHEN one hundred and twenty years ſhall have elapſed, from the day of the miſſing perſon's birth, he is to be declared

compiler of *Hedāya* remarks that *Haſſan* has related this as an opinion of *Haneefa*. According to the *Zāhir Rawāyet*, this point is to be determined by the deceaſe of the *co-evals* of the miſſing perſon, or of his equals—that is, thoſe who are known to reſemble him in health and habits of body. It is recorded from *Aboo Yooſaf* that the term is one hundred years.—Some of the learned, again, fix it at *ninety* years. *Analogy* requires that the term ſhould not be fixed at any particular period, ſuch as *one hundred* years, or *ninety* years, ſince to fix a time merely from *judgment* or *opinion* is illegal: but yet it is requiſite that it be fixed by ſome ſpecific ſtandard, ſuch as the demiſe of the miſſing perſon's co-evals, becauſe, if no criterion whatever were eſtabliſhed, his deceaſe could never be declared. The *benevolence* of the law, however, ſuggeſts that the term be fixed at *ninety* years, as this is the ſhorteſt *fixed* term mentioned[†], and it is difficult to aſcertain any thing reſpecting the circumſtances of the miſſing perſon's co-evals or equals.

at the end of ninety years from his birth:

when his wife is to obſerve an *edit* of widowhood;

UPON the death of the miſſing perſon being duly declared, his wife muſt obſerve her *edit* for four months and ten days from the date of the declaration, ſuch being the *edit* of *widowhood*; and his property is to be divided among ſuch of his heirs as are then living:

and his pro-

caſe, therefore, is the ſame as if he had actually died upon the

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[*] This is the rule in the *Sonna*. The compiler of the *Hedâya*, however, has fixed it at *ninety* years, as appears a little below.

[†] By any of the law doctors or commentators.

inſtant of the declaration, and hence any perſon who died previous to the declaration does not inherit of him.

his living heirs.

If the relation of a miſſing perſon die during his diſappearance, the miſſing perſon is not an heir, becauſe his exiſtence at the time is eſtabliſhed merely from *circumſtances*, as having been once known, and conſequently accounted to continue ſo long as nothing appears to the contrary:—now mere *circumſtantial* evidence is but *weak*, and therefore incapable of conſtituting proof to a claim (that is, to the eſtabliſhment of a thing as yet *un*-eſtabliſhed)—although it conſtitute proof ſufficient for *repulſion*, (that is to ſay, to prove the continuance of a thing *already eſtabliſhed*.) With reſpect to the expreſſion "the miſſing perſon is not an heir,"—it means that, whatever may be hi portion of inheritance, he does not obtain a property in it, but it is held in ſuſpence;—becauſe his being in life is doubtful; and this is a ſufficient cauſe of ſuſpence.—If, therefore, he afterwards appear to be living, it goes to him;—but if there be no evidence of his being in life when ninety years have elapſed, his portion, which has been ſo ſuſpended, is then to be diſtributed among thoſe who were heirs to the original proprietor at the period of his demiſe, as in the caſe of embryos in the womb. In the ſame manner, alſo, if a perſon make a bequeſt to a miſſing perſon, and the teſtator die, the bequeſt does not take place, but is held in ſuſpence, becauſe *bequeſt* ſtands upon a footing with *inheritance*:

A miſſing perſon's right of

during his diſappearance:

but his portion is *held in*

and, at the end of ninety years (if he do not appear in the interim) is divided among the other heirs

It is a rule that if there be another heir beſide the miſſing perſon, who is not entirely precluded by the miſſing perſon, but whoſe right is diminiſhed by his intervention, this heir is to receive that which is the *leaſt* of the two portions of inheritance, and the remainder is held in ſuſpence. If, on the other hand, there be another heir, who is entirely precluded by the *miſſing perſon*, no part of the inheritance is to be paid to him, but the *whole portion* of inheritance muſt be held in ſuſpence. An example, in illuſtration of this caſe, is as follows.

heritance in caſe of a *co-heir*.

A perſon dies, leaving two daughters, and a ſon who has diſappeared; and alſo, a ſon's ſon, and a ſon's daughter; and his eſtate is in the hands of a ſtranger;—and the above heirs, and the ſtranger, all agree that the ſon of the deceaſed is a *miſſing perſon*; and the two daughters demand their inheritance; in which caſe they are paid their moiety out of the deceaſed's eſtate, as this is their undoubted ſhare: but the other moiety, which is the portion of the *miſſing* perſon, is held in ſuſpence, and no part of it paid to the ſon's children, becauſe they are entirely precluded by the miſſing perſon if he be living, and are therefore not entitled to receive the inheritance, becauſe of the doubt:—and this remaining moiety is not to be taken out of the hands of the ſtranger, unleſs he be diſcovered in ſome diſhoneſt practices.—Appoſite to the example of the miſſing perſon is the caſe of a fœtus in the womb, for whom a child's inheritance is reſerved, according to an opinion upon which decrees are paſſed.—If, alſo, there be another heir beſide the fœtus, who is not in any circumſtance precluded, nor his portion altered by the intervention of the *fœtus*, his compleat portion is paid to him: but if this heir be ſuch as is entirely precluded by the intervention of the *fœtus*, nothing whatever is paid to him:—thus, if a man die, leaving a maternal ſiſter, and a pregnant wife, nothing whatever is paid to the ſiſter, as ſhe is entirely precluded from inheritance by the intervention of a child, whether *male* or *female*. If, on the other hand, the heir be one whoſe ſhare is *altered* by the intervention of the *fœtus*, in this caſe the *ſmaller* of the two portions is paid to him, as this *ſmaller* ſhare is his undoubted right,—in the ſame manner as in the caſe of a miſſing perſon.—For inſtance, a man dies, and leaves a pregnant wife, and a mother who acknowledges the pregnancy, in which caſe the wife is paid an *eighth* and the mother a *ſixth*,—becauſe, if the *fœtus* be born *alive*, the wife would receive an eighth, and the mother a ſixth; but if it be *not* born alive, the wife would receive a fourth, and the mother a third:—a ſixth and an eighth are therefore paid immediately, as theſe are their portions at all events.

HEDÁYA.

BOOK XIV.

Of SHIRKAT, or PARTNERSHIP.

Definition of *Shirkat.*

SHIRKAT, in its primitive ſenſe, ſignifies the conjunction of two or more eſtates, in ſuch a manner, that *one* of them is not diſtinguiſhable from the *other*. The term *Shirkat*, however, is extended to *contracts*, although there be no actual *conjunction of eſtates*, becauſe a contract is the *cauſe* of ſuch conjunction. In the language of the LAW it ſignifies *the union of two or more perſons in one concern.*

Partnerſhip is *lawful*;

PARTNERSHIP is lawful, becauſe in the time of the prophet men were accuſtomed to have tranſactions in partnerſhip, and the prophet confirmed them therein.

and of *two kinds*; *by right of property*, and *by contract.*

PARTNERSHIP is of two kinds, *Shirkat Milk*, or partnerſhip by *the right of property*, and *Shirkat Akid*, or partnerſhip *by contract.*

SHIRKAT

Partnerſhip by *right of property* is either *optional*, or *compulſive*; and does not admit of either partner acting with reſpect to the other's ſhare.

Shirkat-Milk applies where two or more perſons are proprietors of one thing;—and it is of two different natures, *optional* and *compulſive*:—*optional*, where two perſons make a joint purchaſe of one ſpecific article; or where it is preſented to them as a gift, and they accept of it; or where it is left to them, jointly, by bequeſt, and they accept of it;—or where they both obtain poſſeſſion, by conqueſt, of one ſpecific article in an enemy's country;—or where they unite their reſpective properties in ſuch a way as that *one* is not diſtinguiſhable from the other, (ſuch as the mixture of *wheat* with *wheat*,)—or where it may be *difficult* to diſtinguiſh them, (as in a mixture of *wheat* with *barley*:)—and *compulſive*, where the properties of two perſons become united without their act, under ſuch circumſtances as render it difficult or impoſſible to diſtinguiſh between them; or, where *two* perſons inherit *one* property. In this ſpecies of partnerſhip, therefore, it is not lawful for one partner to perform any act with reſpect to the other's ſhare, without his permiſſion, each being as a *ſtranger* with reſpect to the other's ſhare. It is, however, lawful for either partner to ſell *his own* ſhare to the other partner, in all the caſes here ſtated:—and he may alſo ſell his ſhare to *others*, without his partner's conſent, excepting only in caſes of *aſſociation* or *admixture* of property, for in both theſe inſtances one partner cannot lawfully ſell the ſhare of the other to a third perſon without his partner's permiſſion. The diſtinctions upon this point are related in the *Kafáyat-al-Moontihee*.

Partnerſhip

Shirkat Akid, or *partnerſhip by contract*, is effected by *propoſal* and *conſent*,—that is, by one perſon ſaying to another, "I have "made you my partner in ſuch a property," *&c.* and the other replying "I conſent:" and it is a condition of the contract that the concern reſpecting which it is made be of ſuch a nature as to admit of delegation, in order that the acquiſition ariſing from it may be participated in by both parties, and that thus the effect or deſign may be eſtabliſhed,—in other words, that the acquiſition may become equally the property of both.

is of four deſcriptions, by

Partnership *by compact* is of four kinds, *viz.*

I. *Shirkat-Moſâwizat*, or partnerſhip by *reciprocity*.
II. *Shirkat-Aimân*, or partnerſhip in *traffic**.
III. *Shirkat-Sinnaia*, or partnerſhip in *arts*.
IV. *Shirkat-Woodjoob*, or partnerſhip upon perſonal *credit*.

Deſcription of *partnerſhip by reciprocity.*

Shirkat-Mofâwizat, or partnerſhip by *reciprocity*, is where two men, being the equals of each other, in point of *property*, *privileges*, and *religious perſuaſion*, enter into a contract of co-partnerſhip;—becauſe this ſpecies of partnerſhip is an *univerſal* partnerſhip in all tranſactions, where each partner reciprocally commits the buſineſs of the partnerſhip to the other, without limitation or reſtriction; for the term *Moſâwizat*, in its literal ſenſe, means *equality*. It is therefore indiſpenſable that a perfect equality exiſt throughout, in the *property*, that is, in the *partnerſhip capital*, ſuch as *dirms* and *deenârs*.—(No regard, however, is paid to an exceſs in any thing *beyond* the partnerſhip capital, ſuch as goods or effects, lands, or debts.) In the ſame manner, it is indiſpenſable that an equality exiſt with reſpect to privileges†; becauſe, if either partner were endowed with privileges not veſted in the other, there could be no perfect equality. In the ſame manner alſo, equality is indiſpenſable in point of *religion* and of *ſect*, as ſhall be hereafter demonſtrated. Partnerſhip by reciprocity is lawful, upon a favourable conſtruction;—but, according to analogy, it is *un*lawful. This, alſo, is one opinion of *Shafeï.*

It requires [illegible] *ial,*

and of privileges;

and ſimilarity of *religion* and and of *ſect.*

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* The commentators define it *partnerſhip* in *purchaſe* and *ſale*. The term does not admit of any *literal* tranſlation.

† Arab. *Tiſſirraf*;

"I know not what *Moſáwizat* is!"—Analogy would ſuggeſt that a partnerſhip of this deſcription is unlawful,—becauſe it includes a power of agency with reſpect to an unknown ſubject, and alſo an obligation of ſecurity with reſpect to a thing undefined; and as each of theſe, individually, is illegal, it follows that, when united, they are illegal *a fortiori*. The reaſon for a more favourable conſtruction upon this point is that the prophet has ſaid "Enter into "partnerſhips by reciprocity, for in that there is great advantage." In this manner, alſo, men had tranſactions together, no perſon forbidding them. Analogy, therefore, is abandoned. *Ignorance*, moreover, in the contract in queſtion, is lawful as a dependant of another circumſtance,—that is, as a dependant of *equality*;—in the ſame manner as in a contract of *Mozáribat*, where the contract comprehends a commiſſion of agency for the purchaſe and ſale of articles unknown, which commiſſion is in itſelf illegal, but is nevertheleſs *legal* in a contract of *Mozáribat*, as a *dependant* of the contract; and ſo alſo in the caſe in queſtion.

The term *re-* *city* muſt be ex-

A CONTRACT of reciprocity is not complete unleſs *reciprocity* be expreſsly mentioned in it, by the parties declaring "we are partners, "in a *partnerſhip by reciprocity*,"—becauſe the conditions of it cannot otherwiſe be known. If, however, in entering into ſuch a contract, they declare all the conditions of it, the contract is lawful, although the term *reciprocity* be not particularly expreſſed in it, becauſe regard is had to the *ſenſe*, and not to the *letter*.

It is lawful

A CONTRACT of reciprocity is lawful between two adults who are free, whether they be both *Muſſulmans*, or both *Zimmees*, ſince, in either caſe, an equality exiſts between the parties. If one of them, alſo, be a *ſcriptural Zimmee*[*], and the other a *Pagan*, the contract is lawful, becauſe *infidelity* is one general deſcription with reſpect to *faith*, and hence equality in point of religion exiſts in this inſtance.

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[*] A *Jewiſh* or *Chriſtian* ſubject of the *Muſſulman* government.

of reciprocity is not lawful between a ſlave and a freeman, or between an infant and an adult; becauſe exiſt in thoſe inſtances;—as an adult freeman is competent to tranſact buſineſs, and to give bail, whereas a ſlave is not competent in either of thoſe points, but by conſent of his maſter; and an infant i at all competent to give bail, nor to tranſact buſineſs, of his

It is not lawful between a *ſlave* and a *freeman*, an *infan*

A CONTRACT of reciprocity is not lawful between a *Muſſulman* and an *infidel*, according to *Haneefa* and *Mohammed*. *Aboo Yooſaf* alleges that it is lawful, becauſe equality exiſts between thoſe in point of *agency* and *bail*, ſince in the ſame manner as it is lawful for a *Muſſulman* to be an agent or a ſurety, ſo is it alſo for an *infidel:* and with reſpect to thoſe particular tranſactions which are lawful to *one* of theſe, and not to the *other* (ſuch, for inſtance, as dealings in *wine* or *pork*,) they are not regarded, in the ſame manner as a ſimilar difference is not regarded where a *Haneefite* enters into a contract of reciprocity with a follower of *Shafeï*, for here the contract is lawful, notwithſtanding the different tenets of thoſe ſects reſpecting wilful dealings in the offſpring of *Taſmeeas**, which are held to be lawful by the followers of *Shafeï*; but which are deemed illegal by the *Haneefites*, as being (according to them) forbidden. Such a contract, however, between a *Muſſulman* and a *Zimmee* is nevertheleſs *abominable* (according to *Aboo Yooſaf*;) as *Zimmees* frequently enter into engagements of an unlawful nature, in conſequence of which a *Muſſulman* might fall into what is prohibited. The argument of *Haneefa* and *Mohammed* is that the two perſons in queſtion are not upon an equality in point of *power of action*,—becauſe, if a *Zimmee* purchaſe *wine* or *pork* with the capital ſtock, the purchaſe is valid, whereas, if a *Muſſulman* were to

or a *man* and an

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* *Taſmeeas* are camels turned looſe and ſuffered to paſture at large without a herdſman, as being dedicated to GOD.

purchaſe theſe articles it is *in*valid: hence the parties are not upon equal footing in point of *tranſaction*.

nor between two *ſlaves*, two *infants*, or two *Mokâtibs*.

A CONTRACT of reciprocity is not valid between two *ſlaves*, two *infants*, or two *Mokâtibs*, becauſe a contract of reciprocity is founded upon each party being ſurety for the other, and the bail of ſuch perſons is invalid. It is to be obſerved, however, that on all occaſions where a contract of reciprocity proves invalid from the non-exiſtence of ſome of its conditions, and thoſe conditions are not requiſite in *Ainân*, (or partnerſhip in *traffic*,) the contract of reciprocity becomes a contract of partnerſhip in *traffic* becauſe of the exiſtence of all the conditions requiſite in ſuch a contract.

It comprehends both *agency* and *bail*.

A CONTRACT of reciprocity comprehends the properties both of *agency* and *bail*. It comprehends the property of *agency*, becauſe if each of the contracting parties were not the agent of the other, the *end*, (namely, *a mutual participation of property*,) would be defeated. It alſo comprehends the property of *bail*, becauſe if each party were not ſurety for the other, the equality, in certain particulars eſſential to traffic (ſuch as the demand of payment from either of them for purchaſes made by the other,) could not exiſt.

A purchaſe made by either partner is participated between both; except in articles of *ſubſiſtence*.

WHATEVER is purchaſed by either of two partners under a contract of reciprocity is participated of by both, except the food and clothing purchaſed by the partner for himſelf and his family;—becauſe a contract of reciprocity requires that both parties be upon a perfect equality: and as each is the other's ſubſtitute in all dealings, it follows that a purchaſe made by *one* is equivalent to a purchaſe by *both*. This, however, is excluſive of ſuch articles as are here excepted, (which exception proceeds upon a favourable conſtruction,) as the articles in queſtion muſt be excluded from a contract of reciprocity, neceſſarily, becauſe there is perpetual occaſion for them: for one partner cannot be made anſwerable for the other's *wants*;

neither can one of them expend the property of the other in the ſupply of his own wants; yet the purchaſe of theſe articles is indiſpenſable; and, on account of this indiſpenſable neceſſity, the food and other articles mentioned appertain ſolely to the purchaſer. (Analogy would ſuggeſt that thoſe articles alſo are participated in by both partners, in conformity with what was before advanced that “ a contract of reciprocity requires that both parties be upon a perfect equality.”) The ſeller of the food or clothing is, however, at liberty to take the price of his commodity from either partner, as he pleaſes; from the *purchaſer*, evidently, ſince it was he who bought the article; and alſo from the *other* partner, ſince he is ſurety for the purchaſer; and in this laſt caſe the other partner takes from the purchaſer a moiety of what he has paid to the ſeller, as having diſcharged a debt of the purchaſer out of property common to both.

A debt incurred by either partner is obligatory upon the other.

WHATEVER debt is incurred by either of two partners in reciprocity, for a thing in which partnerſhip holds, the other partner is reſponſible for the ſame, in order that equality may be eſtabliſhed. Of thoſe things in which partnerſhip holds are *ſale*, *purchaſe*, and receipt of *hire* or *wages*;—and of thoſe in which partnerſhip does *not* hold are *marriage*, and *divorce for a compenſation*, *compoſition for blood wilfully ſhed*, and *compoſition for a ſubſiſtence*, and *offences againſt the perſon*.

Bail for *property*, engaged in by either partner, is binding upon the other;

IF a partner in reciprocity become, in behalf of a *third* perſon, ſurety for property to a ſtranger, it is binding upon the other partner likewiſe, according to *Haneefa*. The two diſciples allege that it is not binding upon the other partner; becauſe a perſon's becoming ſurety for another is a *gratuitous act**; (whence it is that the bail of an *infant*, a *Mazoon*, or *Mokatib*, is invalid,—and alſo, that if a per-give bail upon his deathbed it is valid with reſpect to *a third* of only;)—and as becoming ſurety is a *gratuitous act*, it is to the act of granting a loan, or giving bail for the appearance of any one*; in other words, if one of two in reciprocity were to grant a loan to a ſtranger out of the ſtock, it does not affect the other partner, inſomuch that the right of exacting repayment reſts ſolely with the *lender*, as *lending* is a gratuitous act;—and in the ſame manner, if one of two partners in reciprocity become bail for the perſonal appearance of any one, a requiſition for the production of the perſon bailed cannot be made to the other partner;—and ſo likewiſe in the caſe in queſtion. The argument of *Haneefa* is that bail for property is *gratuitous* in its principle, but in its conſequence induces a kind of obligation or contract; becauſe, in conſequence of the bail, the ſurety is entitled to exact of the perſon bailed whatever he pays to his creditors, provided the bail had been given with his concurrence: it is therefore comprehended in a contract of reciprocity, with regard to its *continuance*; (and the circumſtance of its *continuance* is the point in queſtion, as we ſay "it becomes binding upon his partner *after* becoming ſo upon *him-*"*ſelf*.") With reſpect to what the two diſciples urge, that "a per-"ſon's becoming ſurety for another is a *gratuitous act*; whence the "bail of an infant, a *Mazoon*, or *Mokâtib*, is invalid; and conſe-"quently, that it is not comprehended in a contract of reciprocity," we reply, that a contract of bail entered into by *incompetent* perſons is invalid in its principle; but in the caſe in queſtion it is binding upon the other partner in the circumſtance of its *continuance* only. Bail, therefore, with regard to its *continuance*, as being an act of *exchange*, bears a relation to *traffic*; and traffic is comprehended in a contract of reciprocity. If a *dying* perſon, on the other hand, enter into a contract of bail, it is valid with reſpect to a third of his property, in regard to its *execution*, as well as its *continuance*. Thus bail for *property* is not of a *gratuitous* as bail for *the perſon* on the contrary, is *gratuitous*, both in its *tion* and its *continuance*. Hence bail for *property* is in no re analogous to bail for *the perſon*. As to what the two further urge, that "if one of two partners in reciprocity were to "grant a loan to a ſtranger out of the partnerſhip ſtock, it does not "affect the other partner, as *lending* is a *gratuitous act*,"—it is not admitted; becauſe it is recorded from *Haneefa*, that the act of lending *does* affect the partner: if however it even *were* admitted by *Haneefa*, as not affecting the other partner, we reply that a loan in *money* is equivalent to the act of lending any article of *goods* or *effects*; and hence the property paid to the lender by the borrower may be ſaid to be the *ſame identical property* which he had borrowed, and not a *compenſation* for it, (whence a ſtipulated time or place of repayment are not valid in it,) and therefore, that *lending* does not bear the property of *exchange*. All which is here advanced proceeds upon a ſuppoſition of the bail for property having been contracted with the concurrence of the perſon bailed. If, however, it be entered into without his concurrence, it is not binding upon the other partner, (according to the *Rawâyet Saheeh* of *Haneefa*,) becauſe in a bail ſo contracted the property of mutual obligation or *exchange* does not exiſt in its *continuance*. Let it be obſerved, alſo, that indemnification for uſurped property, or indemnification for damages, ſtand on the ſame ground as bail for *property*, as theſe are of a *retributive* nature in their *principle*.

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* All *conceſſions*, or acts of a *gratuitous* deſcription, are admitted in *law* to affect only the actor himſelf.

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* There is a material difference between bail *for property*, and bail for *the perſon*; as is ſhewn at large elſewhere. (See *Bail.*)

unleſs it be engaged in without conſent of the *ſuretee*.

If a *property*[*], of ſuch a nature as that partnerſhip in it is valid, ſhould fall to one of two partners in reciprocity, by inheritance,—or, if any perſon preſent him with ſuch property, by gift, and he take poſſeſſion of it,—the contract of reciprocity is null, and the partner-

An acceſſion of property to either partner by gift or inheritance reſolves a partnerſhip *by re-*

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[*] Arab. *Mâl.* Meaning property in *caſh*, *bullion*, or other article capable of conſtituting *capital ſtock*; in oppoſition to *Raht* and *Matta*, that is, ſpecific *goods* and *effects*.

ſhip

a partnerſhip ....r becomes a *Shirkat Ainân*, becauſe *equality in point of* (ſuch as is capable of conſtituting *capital ſtock*) is a condition eſſential to a contract of reciprocity throughout, and this does not exiſt in the preſent caſe, as the other partner is not a participator in the property ſo acquired by gift or inheritance, no principle of partnerſhip therein appearing with reſpect to him. The partnerſhip by *reciprocity*, however, is reſolved into a *Shirkat Ainân*, or partnerſhip in *traffic*, as the caſe admits of ſuch a partnerſhip, equality not being eſſential thereto; in *reciprocity*, on the other hand, it is eſſential, and conſequently *reciprocity* no longer continues. The reaſon of this is that a contract of reciprocity is not of an *abſolute* nature: now, in a contract which is not of an *abſolute* nature, the rules with reſpect to its *continuance* and its *commencement* are one and the ſame; hence an increaſe of the capital ſtock [of either parties] during its *continuance* is equivalent to an *inequality* in its *commencement*; and as an inequality of capital, in the *commencement* of a partnerſhip of reciprocity, is prohibitory to contracting it, ſo, in the ſame manner, ſuch inequality taking place during its *continuance* prohibits it:—the contract of *reciprocity*, therefore, terminates. If one of two partners in reciprocity inherit *goods* or *effects**, theſe are his ſole property; but the contract of reciprocity does not become null; (and the ſame rule alſo obtains if one of them inherit *land*;) becauſe, as thoſe articles are incapable of conſtituting *capital ſtock*, equality with reſpect to them is not a condition.

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* Arab. *Rakht wa Mattâ*. In oppoſition to *Mâl*.

SECTION.

SECTION.

Partnerſhip by reciprocity but in caſh

Partnership by *reciprocity*, cannot be contracted but in *dirms*, *deenârs*, or fluctuating *faloos*[*]. *Mâlik* alleges that ſuch a partnerſhip is lawful in goods and effects, and alſo in all articles eſtimable by weight, or meaſurement of capacity, where the ſpecies is the ſame, becauſe a partnerſhip ſo contracted reſpects a known and ſpecified capital, whence thoſe articles are equivalent to money. It is otherwiſe in a contract of *Mozâribat*; for that is reſtricted ſolely to *caſh*, the *legality* of it being contrary to analogy, ſince under this ſpecies of engagement a profit is acquired on property concerning which there is no reſponſibility, (as the manager is not reſponſible for the *Mozâribat* ſtock,) and the prophet has forbidden the acquiſition of gain upon property in which there is no reſponſibility; the contract, therefore, muſt not go beyond what is preſcribed by the LAW; and the only thing in which the LAW declares *Mozâribat* to be lawful is *caſh*. The arguments of our doctors upon this point are twofold.—First, if a contract of reciprocity, in goods and effects, were held to be legal (as maintained by *Mâlik*,) it would neceſſarily induce a profit upon a property concerning which there is no reſponſibility; becauſe, upon each partner in reciprocity ſelling his own particular capital, (conſiſting of *goods* and *effects*,) if the goods of one partner produce a greater price than the goods of the other, the exceſs of profit upon the goods of the *former* would be due to the *latter*; and this would be a profit from property for which the perſon who gains by it is not reſponſible, and in which he has no right; becauſe in this inſtance the contract is

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[*] Arab. *Faloos-Rabiha*. *Faloos* is a copper coin of uncertain value. *Faloos-Rabiha* means copper coin *on which an advantage may be gained*, (owing to the fluctuation in its value,) and hence the term *Rabiha* is here rendered *fluctuating*.

connected with actual *goods*, and not with the *ſemblance* of them, ſuch as *debts*; and the goods are a *truſt* in the hands of each partner reſpectively;—whence it is evident that a profit is induced upon property concerning which there is no reſponſibility. It is otherwiſe with *caſh*, becauſe whatever either partner may purchaſe with the capital ſtock, conſiſting of caſh, the purchaſe thereof is not connected with the actual capital, but with its *ſemblance*, namely *debt*, (ſince the *price* of it is a debt;)—now the purchaſe being connected with the *ſemblance* of the capital, (namely *debt*,) and the other partner alſo being liable to be called upon for it, (as a contract of reciprocity involves *mutual bail*,) it follows that the conſequence objected (of profit upon property *concerning which there is no reſponſibility*) is not induced, ſince this is a property in which there *is* reſponſibility.—SECONDLY, The firſt tranſaction in *goods* and *effects* is the *ſale* of them; and the firſt tranſaction in *caſh* is *purchaſe* made with it:—now a perſon ſelling his property under the condition of another being his partner in the proceeds is unlawful, ſince this is endowing with a right of property in the debt, and an endowment of right in a debt, made to any other than the debtor himſelf, is illegal: on the other hand, his making a purchaſe with his own property, under the condition of another being his partner in the article purchaſed, is lawful, ſince this is endowing with a right of property in an *actual ſubſtance*, and not in a *debt*.—*Faloos-Râbiha*, or fluctuating copper coins, are connected with *dirms* and *deenârs*, [caſh,] as they paſs current, in the ſame manner as gold and ſilver coin. *Mohammed* is of this opinion, becauſe he holds that *faloos* are *caſh*, inſomuch that they cannot be particulariſed by ſpecification; whence it is that if any perſon were to purchaſe an article, for certain *faloos*, he is at liberty to give any other *faloos* in place of them; and alſo, that *two* ſpecified *faloos* cannot be ſold for *one faloos*, according to what is eſtabliſhed. According to the two *elders*, partnerſhip, or *Mozâribat*, are not lawful in *faloos*, although they be *current*, as the valuation of them fluctuates from time to time, and they at length become the ſame as goods or effects.

comprehended under the *ſh*;)

effects[*]. *Aboo Yooſaf* is elſewhere ſaid to entertain the ſame opinion with *Mohammed* upon this point. It is alſo recorded, from *Haneefa*, that a contract of *Mozâribat* is lawful in current *faloos*; but not a contract of *reciprocity*. Thus partnerſhip by reciprocity is not lawful in any thing beyond *dirms*, *deenârs*, and current *faloos*[†]. It is to be obſerved, however, that if gold or ſilver *bullion*, by general uſage, paſs current for value[‡], in this caſe partnerſhip by reciprocity is lawful in it. This is alſo related in the *Kadooree*. It is aſſerted, in the *Jama Sagheer*, that partnerſhip by reciprocity is not lawful in gold or ſilver bullion; for, according to that authority, uncoined gold and ſilver are the ſame as houſehold ſtuff, diſtinguiſhable by identic ſpecification, and therefore incapable of conſtituting capital in either *partnerſhip* or *Mozâribat*. It is ſaid in the *Mabſoot*, treating of *exchange*, that gold or ſilver cannot be identified by ſpecification, inſomuch that a contract of ſale is not broken in conſequence of any accident to the bullion before delivery;—(that is, if a perſon purchaſe any article, agreeing to give for it certain gold or ſilver uncoined, and it be loſt before delivery, the contract of ſale is not broken, becauſe the gold or ſilver cannot be particularly ſpecified.)—Now ſuch being the caſe, it follows (according to this ſtatement) that uncoined gold or ſilver *are* capable of conſtituting capital ſtock, in either *Mozâribat* or *partnerſhip*, on this ground, that the precious metals were originally introduced for the purpoſe of valuation[§]. The opinion delivered in the *Jama Sagheer*, however, is the moſt approved; becauſe, although the precious metals were originally introduced for the purpoſes of traffic, yet their capacity to repreſent property depends upon their being *coined*, as when once *coined*, they are no longer liable

or in gold or ſilver bullion, where that paſſes in currency;

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[*] That is, are no longer *current*.

[†] That is, ſuch as have not yet become depreciated below the current ſtandard.

[‡] Arab. *Simn* (or *Thimn*;) meaning *a repreſentative of property*, and therefore uſed (in purchaſe and ſale) to expreſs *price*.

[§] Arab. *Sil-Simneeat*; that is, *for the purpoſe of conſtituting price*, or (in other words) *of repreſenting property*.

to be uſed for any other purpoſe (ſuch as making ornaments for the perſon, and ſo forth:) uncoined gold or ſilver, therefore, does not conſtitute value, except where the uſe of it in that way is cuſtomary, in which caſe it is the ſame as *coin*, and conſequently a repreſentative of property, and as ſuch capable of conſtituting capital ſtock. It is to be obſerved that what was before advanced, that "partnerſhip by reciprocity is not lawful in any thing beyond *dirms*, *deenárs*, and "current *faloos*," applies to all articles of weight and meaſurement of capacity, or which are of a *heterogeneous* nature*. The illegality of reciprocal partnerſhip in theſe articles is admitted by all our doctors, *provided the partnerſhip be contracted previous to the union or admixture of ſtocks*, in which caſe it is illegal, and each partner receives the profit ariſing from his own particular commodity, and the *loſs* upon it alſo falls on him. If, alſo, two perſons mix *homogeneous* ſtocks, and then enter into a contract of partnerſhip, *Aboo Yooſaf* holds the rule to be the ſame, and that a partnerſhip by *right of property* is here eſtabliſhed, not a partnerſhip by *reciprocity*. Such, alſo, is the doctrine of the *Záhir Rawáyet*. According to *Mohammed*, the contract of partnerſhip, in this inſtance, holds good. The reſult of this difference of opinion appears where the property of both partners is equal, and they ſtipulate a larger profit to *one*, and a ſmaller profit to the *other*;—for in this caſe, according to *Aboo Yooſaf*, each is to receive in proportion to his property, and he in whoſe favour the *larger* profit had been ſtipulated is not on that account entitled to receive any exceſs; but, according to *Mohammed*, each is to receive agreeably to what was ſtipulated. The ground upon which the *Záhir Rawáyet* proceeds is that articles of weight and meaſurement of capacity †, and ſo forth, are diſtinguiſhable by ſpecification *after* admixture, in the ſame manner as *before*. The argument of *Mohammed* is that the articles in queſtion are, in one ſhape, *value*; for if a perſon were to

or (according to *Mohammed*) in homogeneous ſtocks, *after* admixture.

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* Arab. *Adwee Mootkárib*, that is, reſembling in *appearance*, but differing in *ſpecies*.

† Meaning always *grain*, or *liquids*, ſuch as are capable of *admixture*; in oppoſition to *Rakht* and *Mattá*, that is *goods* and *effects*.

ſell goods for ſuch articles, ſo that the price of the goods, (conſiſting of thoſe articles,) is a debt upon the purchaſer, it is lawful; and, in another ſhape, they are ſubjects of *ſale*, as admitting of ſpecification: attention, therefore, is paid to both theſe circumſtances, with reſpect to ſituations both of *admixture* and of *non*-admixture: in other words, partnerſhip in them, *before* admixture, is unlawful, as they are then ſubjects of *ſale*; but *after* admixture it is lawful, as they then conſtitute *value:* contrary to the caſe of *goods* and *effects* of any other deſcription, ſince theſe are not *value* in any ſhape. If the ſtocks [of the reſpective parties] be of two different ſpecies, ſuch as *barley* and *wheat*, or *olives* and *pepper*, and the proprietor unite them, and then enter into a contract of partnerſhip, it is unlawful according to all our doctors. The reaſon for this diſtinction, according to *Mohammed*, is that whatever is mixed, of one ſpecies, is *Zooâtal Imſâl*[*]; and whatever is mixed, of two different ſpecies, is *Zooâtal Keem*[†]: now as things of different ſpecies, when mixed together, are *Zooâtal-Keem*, ignorance exiſts with reſpect to them, (becauſe, it is requiſite that appraiſers fix the value of them[‡],) and they are therefore incapable of conſtituting capital ſtock, in the ſame manner as any other goods or effects:—a partnerſhip in them is conſequently invalid; and ſuch being the caſe, they become ſubject to the rules in admixture of property, as treated of under the head of *Decrees*, in the *Jama Sagheer*, and which ſhall be fully ſet forth (in this work) when we treat of *depoſits*[§].

It cannot be contracted reſpecting *heterogeneous* ſtocks.

WHERE

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[*] Things compenſable by an equal quantity of their own ſpecies, (ſuch as *wheat* for *wheat*, *barley* for *barley*, &c.)

[†] Things compenſable only by an equivalent in *money*.

[‡] Before the reſpective proportion of each partner, in the capital ſtock, can be aſcertained.

[§] The arguments throughout this and the preceding paſſages are ſo much involved in ſubtle diſtinction and perplexing caſuiſtry, and are in many places ſo little capable of an intelligible tranſlation, (from the impoſſibility of rendering clearly the *technical terms* which by *right of property* is ef- one half of his ſtock to the other.

Where two perſons are deſirous of entering into a contract of partnerſhip in *goods* and *effects*, each muſt ſell one half of his own goods in lieu of one half of the goods of the other, ſo that a *Shirkat-Milk*, or *partnerſhip by right of property* may be eſtabliſhed between them; and then let them enter into partnerſhip by compact.—(Our author remarks that in this inſtance a partnerſhip *in right of property* is eſtabliſhed, but that a partnerſhip *by reciprocity* is not lawful, as goods and effects are incapable of conſtituting ſtock in ſuch a partnerſhip.) With reſpect to what is advanced above, that "each "partner muſt ſell one half of his own goods in lieu of one half of "the goods of the other,"—it means, that each is thus to ſell a moiety of his goods to the other, *provided the value of the goods of each be equal.* If, however, the value of the goods of each be *different*, it is requiſite that he whoſe goods are of *leaſt* value ſell ſuch a proportion as may ſuffice to eſtabliſh a partnerſhip; for inſtance, if the value of the goods of *one* be *four* hundred *dirms*, and that of thoſe of the *other* be *one* hundred *dirms*, then let the *latter* ſell *four-fifths* of his goods to the *former*, in lieu of *one-fifth* of *his* goods, ſo that the whole of the goods may be held in partnerſhip between the parties, in five lots, or ſhares. With reſpect to what is advanced by our author, as above, that "a partnerſhip in *right of property* is eſtabliſhed, but a partner-"ſhip *by reciprocity* is not lawful," it is of no weight; for, rendering goods and effects capital ſtock in a contract of reciprocity is illegal, only, becauſe this would induce a profit upon property concerning which there is no reſponſibility,—or, becauſe the reſpective capital of each would be unknown at the time of diviſion: but neither of theſe reaſons exiſt in the caſe in queſtion:—the *firſt* reaſon does not

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which ſo frequently occur in them,) as greatly to obſcure the *matter.* The principle upon which the whole turns is that "a partnerſhip by *reciprocity* cannot be entered into with "reſpect to any articles which are not *ſtandards of value*;" and the queſtion is, "what "articles they are which may be conſidered as ſtandards?"—which ſome of the doctors confine ſolely to *caſh* in the precious metals: others extend it to *bullion*; and others, again, to copper coins [*faloos*;] whilſt ſome include *grain*, contending that this is a ſtandard of , and may therefore be uſed to repreſent property, in the ſame manner as caſh.

exiſt, becauſe upon each ſelling a moiety of his eſtate to the other, the half of each partner, reſpectively, is a ſubject of reſponſibility to the other, with reſpect to its value, and hence the profit which accrues from the property of both is a profit from property which is a ſubject of reſponſibility: and the *ſecond* reaſon does not exiſt evidently, becauſe there is no occaſion for ſpecifying the reſpective capital of each partner at the time of diviſion, ſo as to require the valuation of appraiſers, thence inferring *ignorance* reſpecting it, becauſe the property of both is *equal*, and they are both partners in that property, and conſequently, whatever price the property may bring muſt neceſſarily be divided between them in equal ſhares.

of partner-

SHIRKAT-AINÂN, or partnerſhip in *traffic*, is contracted by each party reſpectively becoming the *agent* of the other, but not his *bail*. This ſpecies of partnerſhip is where two perſons become partners in any particular traffic, ſuch as in *cloths* or *wheat*, (for inſtance)—or where they become partners in all manner of commerce indifferently. No mention, however, is to be made concerning *bail*, in their agreement, as bail is not a condition in a partnerſhip of this nature:—but it is indiſpenſably requiſite that each act as *agent* on behalf of the other; ſince, without this, the deſign, (namely, partnerſhip in property,) cannot be obtained; as acts done on behalf of another are performed either in virtue of ſome avowed authority, or of *agency*; and no *authority* exiſting, *agency* is conſtituted, in order that each may act for the other, ſo that the property may be held in partnerſhip between them.

It does not admit mutua *bail*, but it requires mutual *agency*.

IF the ſtock of one of theſe partners exceed that of the other, it is lawful, becauſe there is occaſion for this equality, (as ſhall be hereafter demonſtrated,) and the terms in which ſuch a partnerſhip is contracted do not require *equality*.

It admits of inequality in

and alſo of a diſproportionate profit.

In partnerſhip in *traffic*, it is lawful that the ſtock of each partner be equal, and yet the profit unequally ſhared,—that is, that it be ſtipulated that the profit to *one* partner exceed the profit to the *other*. *Ziffer* and *Shafeï* maintain that this is not lawful; for if, with equality of *ſtocks*, an inequality of *profit* be admitted, it induces a profit upon property concerning which there is no reſponſibility; becauſe, if the capital appertain to the two in equal ſhares, and the profit be divided into three lots (for inſtance,) the ſharer in the larger proportion of profit is entitled to a ſuperior profit without any reſponſibility, ſince the reſponſibility is in proportion to the capital;—and alſo, becauſe a partnerſhip in the *profit* exiſts in virtue of partnerſhip in the *capital*, (according to their tenets, whence they likewiſe hold the *admixture* of the property to be a condition;)—the profit upon the property, therefore, is the ſame as increaſe of living ſtock; and each is conſequently entitled thereto, in proportion to his original right of property in the capital. The arguments of our doctors upon this point are twofold.—First, the prophet has ſaid "*The profit between them* "*is according to their agreement, and their loſs in proportion to the pro-* "*perty of each reſpectively*;"—where no diſtinction is made between the *equality* or *inequality* of their properties.—Secondly, in the ſame manner as a perſon is entitled to profit in virtue of *property*, he is alſo entitled to it in virtue of *labour*, (as in a caſe of *Mozáribat*, for inſtance:) it may alſo ſometimes happen that one of the partners is more ſkilful and expert in buſineſs than the other, and conſequently, that he will not agree to the other ſharing equally in the profit, whence it is requiſite that one have a larger ſhare than the other. It would be otherwiſe if the *whole* profit were reſtricted to *one* of the partners, becauſe in this inſtance the contract is not a contract of *partnerſhip*: neither is it a contract of *Mozáribat*; for if, in *Mozáribat*, the whole profit be aſſigned to the *manager*, it is a *loan*; or if to the *proprietor of the ſtock*, it is a *Bazát*. With reſpect to what is objected by *Ziffer* and *Sháfeï*, that "if, with equality of ſtocks, an inequality of profit be admitted,

“ it induces a profit upon property concerning which there is “ no reſponſibility,”—we reply that a contract of partnerſhip in *traffic* reſembles a contract of *Mozâribat*, in this particular, that each party reſpectively manages with the ſtock of his partner; and it alſo reſembles partnerſhip by reciprocity, both with regard to its *name*, (as being a *partnerſhip*,) and likewiſe with regard to the *conduct* of it, becauſe both partners act in it. In conſideration, therefore, of its reſemblance to *Mozâribat*, we determine that it is lawful to ſtipulate a profit upon property concerning which there is no reſponſibility; and, in conſideration of its reſemblance to partnerſhip by reciprocity, we determine that, if it be ſtipulated that both partners ſhall act alike*, yet the contract of partnerſhip in actual ſtock is not invalidated.

A perſon may engage a *part* only

It is lawful for either party, in partnerſhip in *traffic*, to engage in the contract with reſpect to a *part* of his property only, and not the *whole*, becauſe an equality in point of ſtocks is not eſſential to it, ſince the term *Ainân* does not require it.

The ſtock can only be ſuch as is lawful in *reciprocal* partnerſhip; but the

Partnership in traffic is not valid except in ſuch property as is lawful in partnerſhip by reciprocity.

It is lawful for two men to engage in a partnerſhip in *traffic*, where the ſtock of one party conſiſts of *dirms*, and that of the other party of *deenârs*, or where on one ſide it conſiſts of *white dirms*, and on the other of *black dirms* †. *Ziffer* and *Shafeï* allege that this is illegal. This difference of opinion is founded on a difference of ſentiments reſpecting the admixture of ſtocks; for, according to thoſe two doctors, a *coaleſcence* of the capital is eſſential to the partnerſhip; and that cannot take place where the two ſtocks are *heterogeneous*. This point will be more fully treated of hereafter.

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* Although a greater ſhare of the profit be conditioned to *one* of the partners.

† The tranſlator has not been able to diſcover the difference between *black dirms* and *white dirms*:—it is probably ſome *local* diſtinction, known in *Perſia* and *Arabia*.

claimed from

WHERE one of two partners in *traffic* makes a purchaſe, the demand for the price lies againſt him, and not againſt the other partner; (becauſe, as has been already demonſtrated, the contract of partnerſhip in queſtion comprehends *agency*, but not *bail*; and the agent is the original with reſpect to rights *;) and on making payment, the purchaſer is to take from the other partner his proportion of the price, (provided he has ſatisfied the demand out of his own particular property, and not out of the partnerſhip ſtock,) becauſe he is the other's agent with reſpect to his ſhare. If, however, it be not *known* whether he has paid the price out of the partnerſhip ſtock, or out of his own property, except from the declaration of the purchaſer himſelf, it is in this caſe incumbent upon him to produce proof; becauſe the purchaſer here advances a claim for property againſt his partner; and the partner reſiſts his claim: and the declaration of a defendant, (delivered upon oath,) is to be credited.

and this partner, on making payment, has recourſe to the

is annulled by the loſs of

of either partner in particular;

IF the whole partnerſhip ſtock, or the ſtock of either partner in particular, periſh before any purchaſe be made, the contract of partnerſhip is annulled: becauſe, in a contract of partnerſhip, the *ſubject* of the contract is *property*, (that being ſpecified in a contract of partnerſhip, in the ſame manner as in a *deed of gift*, or a *will*,) and, in conſequence of the deſtruction of the ſubject, the contract is diſſolved, in the ſame manner as in *ſale*. It is otherwiſe in *Mozâribât*, and *ſingular agency* †, becauſe in thoſe the *dirms* or *deenars* cannot be identified by *ſpecification* ‡, or in any other mode than by *actual* *ſeizin*.

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* That is, *he* is the perſon upon whom all demands are to be made.

† Arab. *Wikâlit-Moofradit*; meaning, agency *with reſpect to ſome particular act*.

‡ That is, *by the mention of them in the contract*.

The agency herein mentioned is reſtricted to the *ſingular* de- for the purpoſe of diſtinguiſhing it from the agency implicated in a contract of partnerſhip or of pawnage, becauſe *that* is annulled by the diſſolution of the partnerſhip or the pawnage, as a thing which is *comprehended* is annulled by the diſſolution of that which comprehended it. An example of *ſingular* agency is where a perſon commiſſions another to purchaſe him a *ſlave*, (for inſtance,) in which caſe, if he give the agent money for that purpoſe, and the money periſh in the agent's hands, yet the agency is not annulled.—"It is otherwiſe" (ſays *Fakr-al-Iſlâm* in his commentary on the *Zeeâdat*,) "in caſes of *Mozâribat* and *partnerſhip*, becauſe the *dirms* and *deenârs* are in both identified by ſpecification, inſomuch that if the money be loſt before delivery, the *Mozâribat* is annulled." This is contradictory to what our author has above advanced, that, "in *Mozâribat* and *ſingular* agency, the *dirms* and *deenârs* cannot be identified by ſpecification, nor in any other way than by actual ſeizin." It is, however, probable that there are *two* opinions recorded on this point. What is above ſaid, that "if the *whole* partnerſhip ſtock, or the ſtock of either partner in particular, periſh before any purchaſes be made, the contract of partnerſhip is annulled,"—is evident, where the whole ſtock of both partners periſhes; and where the ſtock of *one* of the partners periſhes the contract is alſo annulled; becauſe the partner whoſe property has not periſhed had agreed to the other participating in *his* property for no other reaſon than that he ſhould alſo participate in the *other*'s property; but, upon this being rendered impoſſible, he will not agree that the other ſhould participate in *his* property. The contract, therefore, is void, as its continuance is uſeleſs: and, to whomſoever the deſtroyed property belonged, the loſs affects *him* only, and not the *other*, whether it periſh in *his own* hands, or in the hands of his *partner*;—if in *his own* hands evidently; and alſo, if in the hands of his partner, becauſe it is a *truſt* in the hands of that perſon*.

loſs falls entirely upon the partner to whom ſtock ha longed,

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* A truſtee is not reſponſible for his truſt in caſes of *loſs* or *deſtruction*. (See *Depoſits*.)

It

admixture.

It is otherwiſe, however, where the ſtock periſhes after admixture; for in this caſe the loſs falls upon the partnerſhip ſtock generally, ſince, as the property of each is no longer diſtinguiſhable, it follows that the loſs muſt affect *both*.

A purchaſe made by one partner, he the other *afterwards* periſhes, is participated in by *both*; and the partnerſhip continues in force, agreeably to the contract:

If one of the partners in queſtion make a purchaſe with his own ſtock, and the ſtock of the other afterwards periſh before he made any purchaſe with it, in this caſe the thing purchaſed by the firſt partner is in partnerſhip between the two, agreeably to ſtipulation; becauſe, as partnerſhip ſubſiſted between them at the time of the purchaſe, the article purchaſed became a ſubject of partnerſhip between them at that time; and the effect is not altered by the deſtruction of the other's property *after* the purchaſe. This partnerſhip in the purchaſe is a *partnerſhip by contract* * (according to *Mohammed*,) inſomuch that, whoever of the two ſells it, the ſale is lawful. *Haſſan-Ibn-Zeeyâd* alleges that the partnerſhip is merely a partnerſhip *by right of property* †, inſomuch that it is not lawful for either partner to ſell more than his own ſhare, becauſe the contract of partnerſhip was diſſolved in the preſent inſtance, in conſequence of the deſtruction of ſtock, in the ſame manner as where the deſtruction takes place before any purchaſe being made; nothing, therefore, remains, except the *effect* of the purchaſe, namely, *right of property* [in the thing purchaſed,] and hence it is a *partnerſhip by right of property*. The argument of *Mohammed* is that the *contract* has been completely fulfilled with reſpect to the article purchaſed, and conſequently cannot be rendered void by the deſtruction of property after ſuch completion. It is to be obſerved that, in the caſe now under conſideration, the purchaſer is to take from his partner his proportion of the price [of the article purchaſed], becauſe he bought a moiety of it by *agency*, and paid the price out of his own ſubſtance, as was before mentioned.—What is now advanced proceeds upon a ſuppoſition of the purchaſe made by one partner having been effected *before* the deſtruction of the other's ſtock. If, however, the ſtock of one partner firſt periſh, and the other partner then make a purchaſe with his own ſubſtance, and it ſhould have been expreſsly agreed, in the contract, that each is to act as an agent on behalf of the other, in this caſe whatever the purchaſer may have bought is divided between the two, according to their previous ſtipulation; becauſe, although the contract of partnerſhip be annulled, yet the agency, which was expreſsly mentioned in it, continues in force; the purchaſe is therefore participated in by both, in virtue of the agency; the connexion continues a partnerſhip *by right of property*; and the purchaſer is accordingly to take from his partner his proportion of the price, for the reaſon before ſtated. If, on the other hand, the *partnerſhip* only be mentioned in the contract, and nothing expreſſed in it reſpecting each partner acting as an *agent on the other's behalf*, the article purchaſed by one partner appertains ſolely to *him*; becauſe, if the article were participated between the two, it could be ſo only in virtue of the mutual agency implicated in the contract; but, that being annulled, the power of agency implicated in it is alſo annulled. It is otherwiſe where the parties have *expreſsly mentioned* a mutual power of agency; becauſe in this caſe the agency is not annulled by the annulment of the partnerſhip, as agency is here one eſpecial deſign of the contract, and is not merely *implicated* in it.

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* Meaning, that the partnerſhip (with reſpect to the *purchaſe*) continues in force under the original contract.

† That is, exiſting merely in virtue of *a mutual right of property*, and not of the *contract*.

but if it periſh *before* the other's purchaſe, that continues between them under a partnerſhip by *right of property*;

in this caſe it belongs ſolely to the *purchaſer*.

A PARTNERSHIP is legal, although the parties ſhould not have mixed ſtocks. *Ziffer* and *Shafeï* maintain that it is illegal, becauſe the *profit* is a branch of the *ſtock*, and the branch is not to be participated in except where the original ſtock itſelf is alſo participated, which cannot be ſo but by *coaleſcence* or *admixture*. The ground upon which they proceed is that, in a contract of partnerſhip, the

Partnerſhip holds without admixture of ſtocks.

ſtock

is the *ſubject* of the contract, (whence it is that the is referred to the *ſtock*, by each partner ſaying to the other "I "you my partner in ſuch ſtock,"—and alſo, that the ſpecification of the *capital* is an eſſential,)—and, ſuch being the caſe, it is indiſpenſably requiſite that the ſtock be *participated* in by both. It is otherwiſe in *Mozáribat*, as that is not *partnerſhip*, ſince it implies nothing more than that, as the manager is to act for the proprietor of the ſtock, he is conſequently entitled to a ſhare in the profit, as *wages on account of his labour*, which is different from the caſe in queſtion, where the profit is a *branch of the ſtock*, and not *wages for labour*. This is a grand leading principle with *Ziffer* and *Shafeï*, inſomuch that (arguing upon this ground) they allege it to be indiſpenſable, in a contract of partnerſhip, that the ſtock of both partners be of the ſame ſpecies; for, if otherwiſe, (as where one is poſſeſſed of *dirms* and the other of *deenárs*,) they hold that the contract is invalid becauſe of the capital not being participated in by both: and they alſo allege (upon the ſame principle) that *admixture* is an eſſential: and likewiſe, that it is unlawful to ſtipulate an exceſs of profit to either partner, where their ſtocks are equal, as the profit is a branch of the ſtock:—and alſo, that partnerſhip in *arts*[*] and *trades*[†] is illegal, as in thoſe there is no ſtock, (as ſhall be hereafter explained.)—The arguments of our doctors upon this point are twofold.—FIRST, partnerſhip in *profit* is referred to the *contract*, and not to the *ſtock*; becauſe, as the contract is termed "a contract of partnerſhip," it is indiſpenſable that the *property* of the term *partnerſhip* exiſt in it; and, ſuch being the caſe, it follows that the admixture is not eſſential.—SECONDLY, as the *money* [of which the ſtock conſiſts] is not ſpecified, the profit is not derived from the *capital*, nor indeed from any thing elſe than the *tranſactions* [which are had with the ſtock;] becauſe party is a *principal*, with reſpect to *one* half of the ſtock, and an

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[*] Arab. *Shirkat Takabbal* (ſynonymous with *Shirkat Sinnai.*)

[†] Arab. *Shirkat Ammál.*

agent with reſpect to the *other* half; and, as it hence appears that partnerſhip may be eſtabliſhed, in point of *tranſaction*, without admixture of ſtocks, it follows that it may alſo be eſtabliſhed in the thing which accrues from tranſaction, (namely, the *profit*,) without ſuch admixture: and, as the contract of partnerſhip thus becomes ſimilar to a contract of *Mozâribat*, a ſimilarity of ſpecies in the ſtocks, and an equality of profit, are not eſſentials, although the ſtock of each be equal. A partnerſhip in arts is alſo lawful on the ſame principle.

A CONTRACT of partnerſhip, which ſtipulates any particular ſum out of the profit for one of the partners, is unlawful, as this condition is a means of deſtroying partnerſhip, ſince it is poſſible that no more profit may be acquired altogether, than the ſum ſo ſtipulated. Correſpondent to this is a caſe of cultivation; that is to ſay, where the parties, in a compact of cultivation, ſtipulate a particular quantity of produce to one of them, (that is, to the cultivator or to the landlord,) the compact is invalid; becauſe ſuch a ſtipulation is a means of deſtroying partnerſhip; and in cultivation it is eſſential that the produce of the land be equally participated between thoſe perſons.

of either partner.

EACH of the partners, in a contract either of reciprocal partnerſhip or of partnerſhip in actual ſtock, is at liberty to give his ſtock in the manner because it is cuſtomary ſo to do in contracts of partnerſhip; and alſo, becauſe either partner is at liberty to hire any perſon to work for the acquiſition of profit; and as the acquiſition of profit without any return is ſtill leſs objectionable than *hiring* with the ſame view, he is conſequently authoriſed to adopt the other mode *a fortiori*. In the ſame manner alſo, either of them is at liberty to lodge this capital as a depoſit, as this is cuſtomary, and ſometimes neceſſary, among merchants. Each of them is alſo at liberty to give his capital in the way of *Mozâribat*, becauſe, as *Mozâribat* is ſubordinate to partnerſhip either *by reciprocity* or in *traffic*, it follows that a contract of partnerſhip comprehends *Mozâribat*. It is recorded from

Either part-

in the manner of a *Bazât*;

or lodge it as a *depoſit*;

or intruſt it to
of

a partner has not this in his power, becauſe is alſo a mode of partnerſhip. The former opinion, however, is according to the *Mabſoot*, and is the moſt approved, becauſe *partnerſhip* is not the deſign of a contract of *Mozáribat*, the only view in it being the acquiſition of profit. It is therefore lawful to give the capital in the way of *Mozáribat*, in the ſame manner as it is lawful for the proprietor of the ſtock to hire a labourer with wages. It is lawful, indeed, in a *ſuperior* degree, becauſe, where the *Mozarib* manages, and no profit is acquired, there are no wages owing to him from the proprietor of the ſtock, whereas, in a caſe of hire, where the hired perſon manages the ſtock and no profit is acquired, wages are nevertheleſs due to him from the hirer. It is otherwiſe with reſpect to a contract of *partnerſhip*, for neither party is at liberty to engage in ſuch a contract with a third perſon, with regard to the capital, becauſe a thing cannot be a dependant of a ſimilar thing.

Either partner may alſo appoint an *agent* on his own behalf.

EITHER of two partners, *by reciprocity*, or *in traffic*, is at liberty to conſtitute a perſon his agent to tranſact for him, becauſe the appointment of an agent for purchaſe and ſale is a dependency of traffic; and contracts of partnerſhip are formed for the purpoſe of traffic. It is otherwiſe with an agent for *purchaſe*, for he is not at liberty to conſtitute another perſon his agent, to make the purchaſe on his behalf, as the appointment of an agent for purchaſe is a particular contract, the end of which is the acquiſition of ſome ſpecified and exiſtent article, and a thing cannot be the dependant of its ſimilar.

Each partner holds the ſtock in the manner of a *truſt*.

THE poſſeſſion of each of two partners, *by reciprocity* or *in traffic*, over the partnerſhip ſtock, is conſidered as the poſſeſſion of a *truſt*, ſince each poſſeſſes the property with conſent of the proprietor, for this reaſon, that he is to give ſomething in lieu of it, in the ſame manner as where a perſon takes poſſeſſion of a thing with a view to purchaſe it; (not becauſe it is a *pledge*, as in *pawnage*;) the ſtock is therefore a *depoſit*.

SHIRKAT SINNÂI,

Of partnerſhip in arts.

Shirkat Sinnâi, or partnerſhip in *arts*, (which is alſo termed *Shirkat Takabbal**) ſignifies where two *taylors*, or two *dyers*, (for inſtance) become partners, by agreeing to work and to ſhare their earnings in partnerſhip; which is lawful, according to our doctors. *Ziffer* and *Shafeï* allege that this is unlawful; becauſe the deſign of partnerſhip is a participation of gain between the parties, and the partnerſhip in queſtion is not calculated to anſwer this end, ſince a capital is indiſpenſable, as partnerſhip in profit is founded on partnerſhip in ſtock, (according to their tenets, as before ſet forth,) and in the caſe in queſtion there is *no* capital. The argument of our doctors is that the deſign of the contract in queſtion is *the acquiſition of property*, which is attainable by each party conſtituting the other his agent; becauſe upon each becoming agent on the part of the other with reſpect to *one* half, and a *principal* with reſpect to the *other* half, a partnerſhip is eſtabliſhed in the property to be acquired.—Unity of trade and of dwelling-place are not eſſentials in this ſpecies of partnerſhip. *Mâlik* and *Ziffer* controvert this; for according to them unity of trade and of reſidence are eſſentials.

It is not requiſite [illegible] the

the ſame trade or reſide in [illegible]

Objection. It was before mentioned that, according to *Ziffer*, partnerſhip in *arts* is unlawful; but here it appears that he holds it to be lawful; which is a contradiction.

Reply. There are two reports of the opinion of *Ziffer* upon this point. That before recited is conformable to one report; and what is now mentioned is according to another report. —The argument of *Ziffer* in ſupport of his latter opinion is that if the parties be of different trades (ſuch as where a *dyer* and a *bleacher* become partners,) each will be at a loſs with reſpect to the buſineſs undertaken by the other, as that is not his trade; the end of partnerſhip, therefore cannot be obtained: in the ſame manner alſo, if their places of reſidence be different, each is at a loſs with reſpect to the buſineſs of the other. The argument of our doctors is that the

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* Literally "a partnerſhip by *mutual agreement*."

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profit.

cauſe of the legality of the partnerſhip (namely, the acquiſition of property) is in no way affected by unity of trade and place of reſidence, or the reverſe:—it is not affected by unity of *trade*, or the reverſe, becauſe an appointment of agency made by agreement, with reſpect to any buſineſs, is approved, whether the perſon who undertakes it be able to execute it in a good and ſufficient manner, or not at all, ſince the perſon who ſo agrees is not under any obligation to perform the buſineſs himſelf, but is at liberty to appoint any other perſon to perform it; and as each party has it in his power thus to appoint a perſon to perform the buſineſs in queſtion, the contract is conſequently valid: neither is it affected by unity of *place*, or the reverſe, becauſe, if one of the two partners work in *one* ſhop, and the other in *another* ſhop, yet it is evident that no difference whatever is thereby created in eſſential circumſtances.—It is to be remarked that if, in the caſe now under conſideration, the partners ſtipulate to perform equal labour, and to divide the acquiſition ariſing from it in three lots *, the ſame is lawful, upon a favourable conſtruction. Analogy would ſuggeſt that this is unlawful, becauſe the reſponſibility is in proportion to the labour, whence, if this ſtipulation were admitted, it would induce a profit from a matter concerning which there is no reſponſibility: any exceſs to either party, therefore, is unlawful in the preſent inſtance, in the ſame manner as it is unlawful in a *Shirkat Wadjoob*, or partnerſhip *upon credit*, (as ſhall be hereafter demonſtrated.)—The reaſon for a more favourable conſtruction is that what each of the partners takes he does not take in the manner of *profit*; as gain does not bear the denomination of *profit* except where the ſtock and the gain are of the ſame nature; but they are *not* of the ſame nature in the caſe in queſtion, becauſe the *capital*, in this inſtance, is *induſtry*, and the profit *ſubſtance*; the property ſo acquired, therefore, is not *profit*, but merely a *return for induſtry*: now induſtry is appreciable by means of eſtimation; and conſequently, where both partners agree to receive a certain ſpecific proportion, ſuch proportion is an eſtimate of the induſtry of each reſpectively: the exceſs, therefore, is not unlawful with reſpect to him in whoſe behalf it is ſtipulated. It is otherwiſe in a partnerſhip *upon credit*, becauſe in that inſtance the gain is of the ſame ſpecies with the *capital*, (as both conſiſt of *ſubſtance*;) and *profit* is eſtabliſhed where the capital and the gain are of the ſame nature; and as profit on property concerning which there is no reſponſibility is unlawful, except in a contract of *Mozáribat*, it follows that it is unlawful in a contract of partnerſhip *upon credit*: the caſe in queſtion, therefore, is in no reſpect analogous to a caſe of partnerſhip *upon credit*.

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* Two lots for one partner, and one lot for the other.

The work agreed for by either partner is binding upon the other; and either is at liberty to call upon the employer for payment.

In a partnerſhip in *arts*, whatever work one partner agrees to is incumbent upon him, and alſo upon the other partner, inſomuch that the employer may require the performance of it from either; and each is entitled to demand payment from the employer for the buſineſs performed. Upon the employer, alſo, thus paying either, he is thereby diſcharged of all demands. This is evident where the partnerſhip in arts is of a *reciprocal* nature, (by both partners being upon an equality with reſpect to thoſe particulars in which equality is requiſite in a contract of *reciprocity*;)—and where the partnerſhip in queſtion is not of a *reciprocal* nature, but in the manner of a partnerſhip in *traffic*, the ſame is admitted, on a favourable conſtruction. Analogy would ſuggeſt otherwiſe; becauſe the partnerſhip has been contracted in *general* terms, without any mention of *bail*; and *bail* is not one of the articles of a partnerſhip in *traffic*: it would therefore follow that the employer is *not* empowered to require the performance of the buſineſs from either of them indifferently; and alſo, that they are not *both* empowered to require payment from the employer;—and likewiſe, that the employer is not diſcharged from all demands, by paying either indifferently. The reaſon for a more favourable conſtruction is that the partnerſhip is an occaſion of reſponſibility; that is, in conſequence of the partnerſhip, the performance of work is incumbent upon the parties; whence any buſineſs engaged in by either is incumbent upon the other alſo; and the other is accordingly entitled to the payment, as one of them engaging to perform any work equally affects the other; for if the other alſo were not ſubject to this obligation, he would not be entitled to payment: the partnerſhip in queſtion, therefore, is equivalent to a partnerſhip by *reciprocity*, with reſpect to the obligation of work, and the taking poſſeſſion of the payment for it.

Deſcription of partnerſhip *upon credit*.

SHIRKAT WADJOOH, or partnerſhip *upon credit*, is where two perſons, not being poſſeſſed of any property, become partners by agreeing to purchaſe goods jointly, upon their perſonal credit*, (without immediately paying the price) and to ſell them on their joint account. This ſpecies of partnerſhip is termed *Wadjooh*, for this reaſon, that no perſon can purchaſe articles upon credit but one poſſeſſed of perſonal notoriety [*Wijâhit*] among mankind. It may lawfully conſtitute a *partnerſhip by reciprocity*; becauſe each partner may become both bail and agent for the other. Where, therefore, two perſons, capable of bail, make a purchaſe of any article, on condition that it ſhall be held between them in equal ſhares, introducing the term "*by reciprocity*" into their agreement, it is a contract of reciprocity. If, on the other hand, they expreſs their agreement merely in *general* terms, it is a *Shirkat Ainân*, or *partnerſhip in traffic*, becauſe when thus generally expreſſed, it is conducted in the manner of ſuch a partnerſhip. The legality of the partnerſhip in queſtion is according to our doctors. *Shafeï* alleges that it is illegal. The arguments on both ſides have been already recited.

It may include *reciprocity*.

Each partner

IN partnerſhip upon credit, each partner is agent on behalf of the other, with reſpect to what he purchaſes;—becauſe any act which affects another is unlawful, except it be performed in virtue either of agency or of authority[*]; and as authority does not exiſt in the preſent inſtance, agency is certified.

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* Arab. *Wijâhit.* Literally, *perſonal preſence*, or *notoriety*.

The profit of each p[illegible] proportion to the ſhare of each in the adventure.

If the partners agree that what they purchaſe ſhall be held between them in equal ſhares, and that the profit alſo ſhall be equally divided, it is lawful: but it is not lawful, in ſuch a caſe, to ſtipulate an exceſs of profit to *one* of them. If, however, they agree that what they purchaſe ſhall be held between them in three lots, and that the profit alſo ſhall be divided into three lots[†], it is lawful. In ſhort, if the profit be in proportion to the right of property it is lawful, but otherwiſe not. The reaſon of this is that men are entitled to profit only on account of *ſtock*, *management*, or *reſponſibility*; thus the proprietor of a ſtock is entitled to profit in virtue of the ſtock; a manager in virtue of his management; and a maſter artiſan, who employs a ſcholar or apprentice at *half* wages or *third* wages (for inſtance) is entitled to the profit ariſing from his work in virtue of his reſponſibility for ſuch work;—(whence it is that if a perſon ſay to another "Tranſact with your own ſtock on condition that the profit be "mine," it is unlawful, becauſe in ſuch a caſe, no one of the above particulars exiſts.) As men, therefore, are entitled to profit only on ſome one of theſe three principles, and as, in a partnerſhip of credit, the title to profit is in virtue of reſponſibility (as aforeſaid,)—and as, alſo, reſponſibility attaches in proportion to the right of property in the thing purchaſed,—it follows that whatever exceeds the proportion of ſuch right of property is a profit upon a thing concerning which there is no reſponſibility. Now the ſtipulation of profit from a thing concerning which there is no reſponſibility is not valid except in a contract of *Mozáribat*; and a partnerſhip upon credit has not the property of a contract of *Mozáribat*. It is otherwiſe in a partnerſhip

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[*] Arab. *Willâyat*. Meaning the authority derived from natural or perſonal right, ſuch as that of a *guardian* or a *proprietor*.

[†] That is, two lots to one, and one lot to the other.

in traffic, as that has the property of a contract of *Mozâribat*, inaſmuch as each partner *in traffic* tranſacts buſineſs with the ſtock of the other partner, in the ſame manner as a *manager* tranſacts with the ſtock of the *proprietor*, whence a partnerſhip in *traffic* is, in effect, a *Mozâribat*.

SECTION.

Of INVALID PARTNERSHIPS.

Partnerſhip does not hold in articles of

PARTNERSHIP is not lawful in *wood*, *graſs*, or *game*. If, therefore, two perſons enter into a contract of partnerſhip with reſpect to articles, and afterwards collect wood, or *graſs*, or kill game in hunting, the wood or graſs ſo collected, or the game ſo killed, by either of them, belongs to him ſolely, and not to the other partner. The ſame rule holds in caſes where two perſons enter into a contract of partnerſhip with reſpect to any other articles of a *neutral* nature, (ſuch as fruit collected from the trees of the foreſt, which are common property;) becauſe a contract of partnerſhip comprehends a commiſſion of agency; and the appointment of an agent for procuring things of a *neutral* deſcription is null, becauſe the inſtructions of a conſtituent to this effect are invalid, ſince an appointment of agency ſignifies an endowing with authority to tranſact concerning a matter originally ſubject to the acts of the *conſtituent* only, and not of the *agent*; but it is otherwiſe in the caſe in queſtion, as the agent is here at liberty himſelf to take the neutral article *without* the inſtruction of his conſtituent, and conſequently is incapable of appearing as his *deputy* concerning it. In ſhort, a right of property in a neutral article is eſtabliſhed only by the acts of *taking* and putting it in *cuſtody*: if, therefore, both partners take it *jointly*, it is equally in partnerſhip between them, as they are both equally entitled to it:—but if *one* of them only exert himſelf in taking it, the other doing nothing, it belongs wholly to the one who acts: if, on the other hand, one be the *chief actor*, and the other only an *aſſiſtant*, (as where one *plucks* the fruit, and the other *collects* it,—or, where one both plucks and gathers it, and the other carries it away,) in this caſe the aſſiſtant is to receive *wages* in proportion to his labour.—This is according to *Mohammed.* (*Aboo Yooſaf* alleges that this rule holds only where the wages do not exceed half the value of the article in queſtion; but that, if the wages exceed this, one half of the *value* only is paid to the aſſiſtant, becauſe, as he had agreed to accept one half of the article ſpecified, his right fails with reſpect to any larger proportion.)

ſion of *jointly*

If one man poſſeſs a mule, and another a *Maſhack*, (or leather bucket, ſuch as is uſed in drawing water,) and they enter into a contract of partnerſhip in drawing water*, by agreeing that whatever may be acquired thereby ſhall be in partnerſhip between them, ſuch partnerſhip is invalid, the whole acquiſition going to the perſon who actually draws the water; and if this be the owner of the *mule*, he owes the other the adequate hire for the *bucket*; or, if it be the owner of the *bucket*, he owes the other an adequate hire for the *mule*. The reaſon of the partnerſhip being invalid is that it is contracted with reſpect to an article of a *neutral* nature, (namely, *water*,) and is therefore unlawful. The hire of the mule or the bucket is due, becauſe the neutral article (namely the *water*) becomes the property of the perſon who drew it; and as he derives an advantage, under an in-

nor in *this* inſtance, where the

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* Water is in many parts of *Aſia* procured from *draw-wells*, ſunk to a conſiderable depth. From the edge of ſuch wells a road is conſtructed or cut, going off from twenty to thirty yards, in an *inclined plain*; and over the well is erected a *frame* or *croſs piece*, furniſhed with a pulley, through which a line runs, having ſuſpended at one end a large leather bucket, [*Maſhack*;] the other end is faſtened to traces, in which a mule, bullock, or other animal, moving to and fro' on the inclined road, by this means draws the water.

valid contract, from the property of another perſon, (namely, from his *mule* or his *bucket*,) it follows that he owes a hire for the ſame.

The profit to each partner be in

In all caſes of invalid partnerſhip, the profit is in proportion to the ſtock; any ſtipulation, therefore, of an exceſs of profit to either partner is null. Accordingly, if the ſtock be between the partners in *equal ſhares*, and they agree to their profit being in *three lots*, ſuch agreement is null, and the profit muſt be equally divided; becauſe, as the profit which accrues is a dependant of the ſtock, the *degree* of it muſt be in proportion to the ſtock, in the ſame manner as, in a contract of cultivation, the grain which is reaped is a dependant of the *ſeed*. The reaſon of this is that a claim to an exceſs profit can exiſt only in virtue of a previous ſpecific agreement: but in the caſe in queſtion this agreement has become invalid in conſequence of the invalidity of the contract of partnerſhip *itſelf*: the claim, therefore, remains in force only in proportion to the capital ſtock.

A contract of partnerſhip is annulled by the death or apoſtacy of either partner;

If one of two partners die, or apoſtatize, and be united to a foreign country*, the contract of partnerſhip is annulled;—becauſe a contract of partnerſhip comprehends an appointment of agency, which is eſſential to the exiſtence of partnerſhip, for the reaſons already aſſigned: now *agency* is annulled by *death*; and it is alſo annulled by the circumſtance of deſertion to a foreign country during apoſtacy, where the *Kâzee* iſſues a decree in conſequence of ſuch deſertion, becauſe that is equivalent to death,—as has been already ſhewn in treating of *apoſtates*: upon the *agency*, therefore, being annulled, the contract of partnerſhip is alſo annulled.

whether the ſurvivor be aware of that event or not.

It is alſo to be obſerved that the ſurviving partner being aware of the deceaſe of his fellow, or otherwiſe, makes no difference whatever with reſpect to the diſſolution of the partnerſhip; becauſe as, in the caſe in queſtion, the ſurvivor is virtually diſcharged from the agency by the deceaſe of his partner, it is not eſſential that he be informed of that event. It is otherwiſe where one of two partners *breaks* the contract of partnerſhip, for the effect of ſuch a breach depends upon the knowledge of the other partner, as the *breach* is a deſigned *diſſolution of the contract*.

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* That is, be expatriated by a decree of the *Kâzee*, iſſued in conſequence of his apoſtacy and deſertion. (See *Inſtitutes*, p. 229.)

SECTION.

A perſon cannot pay *Zakât* upon his partner's property without his permiſſion.

It is not lawful for either partner to pay the *Zakât* upon the other's property without his permiſſion, as the payment of *Zakât* is not a branch of traffic.

Caſe of mutual permiſſ

If each of the partners give a general permiſſion to the other to pay the *Zakât* upon his property, and each ſhould afterwards firſt pay the *Zakât* upon his own particular ſhare in the ſtock, and then pay *Zakât* upon his *partner*'s ſhare, in this caſe he who *laſt* paid the *Zakât* is reſponſible, whether he be aware of the other having already paid it or not. This is according to *Haneefa*. The two diſciples allege that he is not reſponſible, where he is not aware of that circumſtance. What is here advanced proceeds upon a ſuppoſition of each partner having paid the *Zakât* upon their reſpective ſhares of ſtock *ſucceſſively*, and not all together; for where they have paid it all together, each is reſponſible for the other's proportion of it. A correſpondent difference of opinion obtains where any indifferent perſon directs another to pay the *Zakât* upon his property, and the other accordingly pays the *Zakât* upon his property after the perſon who ſo directed him had already paid it; for, according to *Haneefa*, the perſon acting under ſuch direction is reſponſible, whether he pay the *Zakât* with a knowledge of the above circumſtance, or otherwiſe. The two diſciples, on the other hand, maintain that he is not reſponſible unleſs he pay it, having a knowledge of that circumſtance, as he has acted by direction, and conſequently cannot be held anſwerable. They admit, indeed, that it may be objected that what the perſon acting under ſuch direction pays is not *Zakât* *, and conſequently he ought to be reſponſible:—but to this they reply that the order which the perſon in queſtion received was not in fact an order *to pay ſo much* ZAKÂT, but rather, merely, an order *to transfer ſo much to the* POOR, ſince the payment of actual *Zakât* is not within his province, as this is connected with the intention of the principal, and no more can be required of the perſon ſo directed than what is within his province and ability:—the perſon in queſtion, therefore, ſtands in the ſame predicament with one who is directed to perform ſacrifice on behalf of another, in a caſe of detention; thus, if a perſon engaged in the ceremonies of pilgrimage were to fall into the hands of an enemy, and to direct any other perſon to perform ſacrifice at the temple on his behalf, and the other perform ſacrifice accordingly, after the principal had been releaſed from the enemy, and had completed his pilgrimage, yet he does not bear the loſs †, whether he be aware of the detention having ceaſed, or otherwiſe. The argument of *Haneefa* is that the perſon in queſtion has been directed "*to pay* ZAKÂT;" and as what he pays is not in fact *Zakât*, it is evident he has acted contrary to the orders of his principal, whoſe deſign in giving ſuch orders was to diſcharge himſelf from an obligation incumbent upon him; (for it is evident that his ſole view in ſubjecting himſelf to ſuch an expence is to ward off the divine anger attending the neglect of *Zakât*;)—now, as (in the caſe in queſtion) this deſign has been fully anſwered by the payment of the *principal himſelf*, it can no longer be ſo by the payment

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[*] Becauſe *Zakât* has been already paid by the *principal*, and hence what this perſon pays is not properly *Zakât*, but rather *gratuity* or *alms-gift*.

[†] That is to ſay, the expence attending the ſacrifice, (although it be inſufficient and nugatory under ſuch a circumſtance,) nevertheleſs falls upon the *director*, not upon the *perſon directed*.

ment of his *ſubſtitute*, and hence it follows that the ſubſtitute is diſcharged from his commiſſion, whether he be aware or not, becauſe this is a *virtual* diſcharge, and to that knowledge is not eſſential. With reſpect to the caſe of ſacrifice under a circumſtance of *detention*, as adduced by the two diſciples, ſome in reply to it allege that the principle there advanced is not generally admitted, as concerning *that* alſo there is a difference of opinion. Others, again, maintain that there is an eſſential difference between that caſe, and the caſe under conſideration. The reaſon they give for this difference is, that ſacrifice is not *incumbent* upon the detained perſon, as he is permitted to delay it until his detention ſhall ceaſe. The payment of *Zakât*, on the other hand, is *incumbent*, whence the deſign in appointing an agent to pay it is *to diſcharge an obligation*; and as this deſign is not fulfilled*, it follows that the agent has no credit for his payment, and that what he pays is a waſte and deſtruction of the property of his principal, for which he is conſequently reſponſible. The caſe of ſacrifice under a circumſtance of detention, therefore, is not analogous to the caſe now under conſideration, as ſacrifice in ſuch a circumſtance is merely *lawful* but not *incumbent*, and hence the ſacrifice performed by the delegate is not to be regarded as a waſte and deſtruction of the property of his principal, for which reaſon he is not reſponſible.

If one of two partners by reciprocity permit the other partner to purchaſe a female ſlave with the partnerſhip ſtock, and to have carnal connexion with her, and the other act accordingly, in this caſe the ſlave appertains to the purchaſer, and he is not reſponſible for any thing. This is according to *Haneefa*. The two diſciples allege that the other partner is entitled to take half the price of the ſlave; becauſe the purchaſer has paid for the ſlave out of the partnerſhip ſtock, and conſequently his partner has a right to be repaid his ſhare in the

A female ſlave, purchaſed under a contract of reciprocity, becomes the property of that partner who, with

carnal connexion with her:

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* As it has been already fulfilled by the payment of the *principal himſelf*.

ſame manner as in the purchaſe of *victuals* or *clothing*;—(that is, as, where one of two partners by reciprocity purchaſes victuals or clothing, paying the price out of the partnerſhip ſtock, the other partner is entitled to take half the price from the purchaſer, ſo alſo in the caſe in queſtion.) The ground upon which this proceeds is that the ſlave in queſtion has become the ſole and excluſive property of the purchaſer becauſe of the neceſſity of legalizing generation; and as the *price* is due in proportion to the *right of property*, it follows that the price of the ſlave is ſolely and excluſively due from the *purchaſer*. The argument of *Haneefa* is that the ſlave has fallen into the poſſeſſion of *both* partners, *a certiori*, according to what partnerſhip requires, (for they cannot alter the requiſites of partnerſhip;) the ſlave, therefore, is the property of *both*, in the ſame manner as if no permiſſion had been given: now the *permiſſion* implies that the perſon who grants it makes a *gift* of his ſhare to the purchaſer; for carnal connexion is lawful only in virtue of *right of property*; and there is no mode of eſtabliſhing that in the preſent caſe but by *gift*; becauſe *ſale* cannot be ſuppoſed on this occaſion *, as the eſtabliſhment of a right of property by *ſale* would be repugnant to the requiſites of a contract of partnerſhip; for if the partner were to *ſell* his ſhare to the purchaſer, ſtill *that* ſhare is in partnerſhip between the two, and does not belong excluſively to the purchaſer. His ſhare, therefore, is made the property of the purchaſer by *gift* implied in the permiſſion granted to the purchaſer to have carnal connexion with the ſlave. It is otherwiſe with reſpect to *victuals* and *clothing*, becauſe as theſe are excepted from the contract *of neceſſity*, they are the ſole property of the purchaſer in virtue of the ſpirit of a contract of purchaſe and ſale; he, therefore, muſt pay half the price thereof to his partner, becauſe he has diſcharged a debt due from *himſelf* [for the above articles] out of the partnerſhip ſtock, whereas, in the caſe under conſideration the purchaſer diſcharged a *partnerſhip* debt, which was equally due from *both* partners, for the reaſons already alleged.— It is to be obſerved that, in the caſe in queſtion, the ſeller of the ſlave is at liberty to take the price from either partner, according to all our doctors, becauſe this price is a debt incurred by an act of traffic. A contract of reciprocity, moreover, comprehends bail; and hence the price of the *ſlave* reſembles (in this reſpect) the price of *victuals* or *clothing*.

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* Meaning a *complete* ſale from one partner to the other.

but the ſeller may take the price from either.

HEDÀYA.

BOOK XV.

Of WAKF, or APPROPRIATIONS[*].

Definition of *Wakf*; and various opinions reſpecting it.

WAKF, in its primitive ſenſe, means *detention*. In the language of the LAW, (according to *Haneefa*,) it ſignifies the appropriation of any particular thing in ſuch a way that the appropriator's right in it ſhall ſtill continue, and the advantage of it go to ſome charitable purpoſe, in the manner of a *loan*. Some give it as the opinion of *Haneefa* that, as the *advantage* of a thing is a nonentity, and as the alms-gift of a nonentity is invalid, it follows that *appropriation* is utterly illegal[†]. It is, moreover, recorded in the *Mabſoot* that *Haneefa* held appropriation to be invalid. The moſt approved authorities, however, declare it to be valid according to him; but ſince (like a *loan*) it is not of an *abſolute* nature[‡], the appropri-

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[*] Meaning always *of a pious or charitable nature*.

[†] That is, has no force *in law*.

[‡] That is, *it is not* IRREVOCABLE.

To take. [illegible]

ator is held to be at liberty to reſume it, and the ſale or gift of it is conſequently lawful. According to the two diſciples, *Wakf* ſignifies the appropriation of a particular article, in ſuch a manner as ſubjects it to the rules of divine property, whence the appropriator's right in it is extinguiſhed, and it becomes a *property of* God by the advantage of it reſulting to his creatures.—The two diſciples, therefore, hold appropriation to be abſolute; and, conſequently, that it cannot be reſumed, or diſpoſed of by gift or ſale; and that inheritance alſo does not obtain with reſpect to it. (There is, indeed, one point upon which the diſciples differ in opinion: for, according to *Aboo Yooſaf*, the appropriation is abſolute from the inſtant of its execution; whereas *Mohammed* holds it to become abſolute only on the delivery of it to a *Mootwalee*, or procurator *;—as will hereafter appear.) Thus the term *Wakf*, in its literal ſenſe, comprehends all that is mentioned both by *Haneefa* and by the two diſciples. Now, ſuch being the caſe, no preference can be given to the tenets of one party over that of the other, as drawn from the *meaning of the term*; this preference, therefore, muſt be given as drawn from *arguments*. The arguments of the two diſciples upon this ſubject are twofold: FIRST, when *Omar* was deſirous of beſtowing in charity the lands of *Simág*, the prophet ſaid to him "*You* "*muſt beſtow the* ACTUAL LAND ITSELF, *in order that it may not re*-"*main liable to be either* SOLD *or* BESTOWED, *and that* INHERITANCE "*may not hold in it*:—SECONDLY, there is a neceſſity for the appropriation being *abſolute*, in order that the *merit* of it may reſult for ever to the appropriator; and this neceſſity is to be anſwered only by the appropriator relinquiſhing his right in what he appropriates, and dedicating it ſolely to God; which dedication, as being agreeable to the LAW, in the ſame manner as that of a moſque, muſt therefore be made in the ſame mode. The arguments of *Haneefa* concerning it are various. First, the prophet has ſaid "*Property cannot, after the deceaſe of the proprietor, be detained from diviſion among his heirs*;"—(in other words, *appropriations are not* ABSOLUTE, *but* INHERITABLE.) *Shirrah* moreover ſays "the prophet determined the ſale of an appropriation to be lawful,"—which is as much as to ſay that "before the promulgation of the LAW by the holy *Mohammed*, (on whom be the bleſſing and peace of God) appropriations were abſolute; but our LAW has rendered them otherwiſe."—Secondly, the appropriator's right in the article appropriated muſt ſtill continue in force, for this reaſon, that it is lawful for the creatures of God to derive an advantage from it, either by tillage (if it conſiſt of *land*,) or by *reſidence*, (if it conſiſt of *dwelling-houſes*;) for if no one had any right in it, any acts with reſpect to it would be unlawful, in the ſame manner as with reſpect to a *moſque*. It is, therefore, evident that a right of property in it ſtill continues: and it is alſo evident that this right of property muſt reſt with the *appropriator*, and not with any *other* perſon, as he alone is entitled to expend the revenue ariſing from it upon the objects of the appropriation, and to appoint a procurator over it: but yet, as the term *Wakf* implies *giving in charity*, the uſe of it reſembles that of a *loan*. Thirdly, the appropriator wiſhes to apply the revenue ariſing from what he appropriates to ſome charitable purpoſe in *perpetuity*, which is impoſſible, unleſs his right of property in it continue. Fourthly, it is impoſſible that the appropriator's right of property in the *Wakf* ſhould be extinguiſhed, during its exiſtence, without its becoming the property of ſome other perſon, as the LAW does not admit the idea of a thing, during its exiſtence, going out of the poſſeſſion of *one* proprietor without falling into the poſſeſſion of *another* proprietor.) *Wakf*, therefore, in this particular reſembles a *Sayeeba*. (A *Sayeeba* is a female camel, ſet at liberty in purſuance of a vow, (as where a man ſays "if I return home from this journey," or, "recover from this diſorder a certain female camel of mine i which the owner prohibits himſelf from any further uſe of; in the ſame manner as a *Baheera*, or female camel, which, after producing ten colts, it was cuſtomary, in times of ignorance, then to ſet at liberty, rendering it unlawful to be uſed or eaten.) Appropriation, in ſhort, reſembles the Pagan act of ſetting a camel at liberty, in this reſpect, that the thing appropriated does not go out of the right of property of the proprietor:—in other words, if a man conſtitute his quadruped a *Sayeeba*, ſtill it continues his property; and ſo alſo, if a perſon *appropriate* his lands or quadruped. It is otherwiſe in a caſe of *manumiſſion*, as that is a *dereliction* of property. It is otherwiſe alſo in the caſe of a *moſque*, as that is dedicated purely to God, (whence it is unlawful to derive any *advantage* from a moſque,) whereas, in a caſe of appropriation, the right of the *individual* ſtill continues in force, and that, conſequently is not dedicated purely to God.

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* Literally, *a perſon endowed with authority*; the term *procurator* is adopted by the tranſlator, as being peculiar to the management of a *religious* foundation, and as diſtinguiſhing this office from that of a *common agent*.

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* Literally, *running about at liberty*. It may be uſed towards a female ſlave as a *formula*

It is reported by *Kadooree*, from *Haneefa*, that the appropriator's right of property is not extinguiſhed, except where the magiſtrate ſo decrees, or where the appropriator himſelf ſuſpends it upon his deceaſe, by declaring "When I die, this houſe is appropriated to ſuch a "purpoſe," (and ſo forth.) *Aboo Yooſaf* alleges that his right of property is extinguiſhed upon the inſtant of his ſaying "I have appro-"priated;"—(and ſuch alſo is the opinion of *Shafeï*,) becauſe that is a dereliction of property, in the ſame manner as *manumiſſion*. *Mohammed* ſays that it is not extinguiſhed until he appoint a procurator, and deliver it over to him: and decrees are paſſed upon this principle. The reaſon of this is that the right of God cannot be eſtabliſhed in an appropriated article but by implication, in the conſignment of it to his creature; (as a transfer to the Almighty, who is himſelf the proprietor of all things, although it cannot be effected *actually* and *expreſsly*, yet may be ſo *dependantly*;)—it therefore becomes ſubject to the rules of divine property *dependantly*, and conſequently reſembles *Zakât* and alms-gift. With reſpect to what is reported from *Haneefa*, that "the appropriator's right of property is

Alienation of the article appropriated is completed by a decree of the magiſtrate, and the declaration of

ngnment of it to a procurator.

A decree of the magiſtrate fixes an

but the deciſion of a *refe-ree* does not fix it.

"extinguiſhed by a decree of the magiſtrate,"—our author remarks that this is approved doctrine, as ſuch a decree removes all difference of opinion. With reſpect, however, to what is further reported from him, that "the appropriator's right of property is extinguiſhed in conſequence of his ſuſpending that upon his deceaſe," it is altogether unfounded, as his right of property cannot be extinguiſhed but by his beſtowing the uſe of the article for charitable purpoſes *in perpetuity*, in which caſe it is the ſame as a bequeſt of perpetual uſufruct:—in this inſtance, therefore, his right of property becomes extinct, and the appropriation is abſolute. It is related, in the *Fatâvee Kâzee Khân*, that judicial degrees are iſſued on the ſub- of appropriations only in caſes where a perſon having appropriated a particular artile, and delivered it over to a *Mootwalee* or procurator, is afterwards deſirous of reſuming it; and the latter diſputes the reſumption, on the plea of the appropriation being abſolute; and they carry the matter before a *Kâzee*, who decrees it to be abſolute.—Concerning a caſe where the parties authoriſe any third perſon to decide upon this point, and he decides the appropriation to be abſolute, there is a difference of opinion: it is certain, however, that ſuch a deciſion is not binding upon the parties.

Caſe of an ap- bed.

If a perſon make an appropriation upon his death-bed, reports that, according to *Haneefa*, it ſtands in the ſame predicament with a bequeſt after death,—(that is to ſay, is *abſolute*:) contrary to an appropriation made during *health*, which is held by *Haneefa* not to be of an *abſolute* nature. The true ſtatement, however, is that the appropriation in queſtion is *not* abſolute, according to *Haneefa*; but it is *abſolute*, according to the *two diſciples*; with this diſtinction, however, that the appropriation here treated of is regarded as from the *third* of the appropriator's eſtate, whereas an appropriation made during health is regarded as from the *whole* of the appropriator's property.

[illegible] of property is deſtroyed; but without a transfer of that right to any other perſon.

UPON an appropriation becoming valid, (that is, *abſolute*, according to the various opinions of our doctors, as here ſtated,—according to *Haneefa*, in conſequence of the appropriator's declaration, and the magiſtrate's ſubſequent decree,—and according to *Aboo Yooſaf*, by his ſimple declaration,—and according to *Mohammed*, by his declaration and delivery to a procurator,)—it paſſes out of the poſſeſſion of the appropriator; but yet it does not become the property of any other perſon; becauſe, if this were the caſe, it would follow that it is not in a ſtate of *detention*, but may be ſold in the ſame manner as other property; and alſo, becauſe if the perſon or perſons to whom it is aſſigned were to become the *proprietor* of it, it would follow that it could not afterwards paſs out of his poſſeſſion in conſequence of any condition ſtipulated by the former proprietor,—whereas it is *not* ſo, for if a perſon were to appropriate a *dwelling-houſe* (for inſtance) to the *poor* of a particular tribe, and the poverty of any one of theſe were afterwards removed, the right in it paſſes to the others, which it could not do if this perſon were a *proprietor*.

Any propriated.

THE appropriation of an undefined part or portion of any thing* is lawful, according to *Aboo Yooſaf*. *Mohammed* alleges that an appropriation of this nature is unlawful; becauſe, as *actual poſſeſſion* is held by him to be an eſſential, (by the procurator taking poſſeſſion of the article appropriated,) ſo, in the ſame manner that without which poſſeſſion cannot take place is alſo an eſſential, namely *diviſion*; and this can only be in a thing capable of diviſion. (With reſpect, however, to a thing incapable of diviſion, the appropriation of an indefinite portion of it is held to be legal by *Mohammed* alſo, as he conceives an analogy between this and a *gift*, or *charitable donation*.) The ground upon which the opinion of *Aboo Yooſaf*, proceeds is, that the ſeparation of an indefinite part of any thing is indiſpenſable to the taking poſſeſſion of it; but as the *taking poſſeſſion* is not (according to him) eſſential in a caſe of appropriation, (whence the *means* of taking poſſeſſion is alſo uneſſential,) it follows that the appropriation of an indefinite part of any thing is held by him to be lawful. From this rule, however, he excepts a *moſque*, or *burying-ground*, the appropriation of any undefined portion of which is unlawful, although it be of an indiviſible nature; becauſe the continuance of a participation in any thing is repugnant to its becoming the excluſive right of God; and alſo, becauſe the preſent diſcuſſion ſuppoſes the place in queſtion to be incapable of diviſion, as being narrow and confined, whence it cannot be divided but by an alternate application of it to different purpoſes, ſuch as its being applied one year to the interment of the dead, and the next year to tillage, or, at one time to prayer, and at another time to the keeping of horſes, which would be ſingularly abominable. It is otherwiſe with regard to the appropriation of any thing elſe than a *moſque* or *burying-ground*; becauſe the appropriation of an undefined portion of any other matter, where it is of an *indiviſible* nature, is decreed to be lawful by all our doctors, as it may be *hired*, (for inſtance,) and the parties may divide the rent.

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* Such as the *half*, or the *fourth*, of a *field*, *houſe*, &c.

Caſe of appropriation of *land*, where an indefinite portion of it afterwards appears to be the property of another perſon.

If a perſon appropriate land*, and it ſhould afterwards appear that an indefinite portion of the land (ſuch as a *fourth*) was the property of another perſon, the appropriation is void with reſpect to the remainder alſo, according to *Mohammed*; becauſe, in this inſtance, the ſeparation into *indefinite diviſions* is aſſociated with the appropriation, which is conſequently invalid, in the ſame manner as a gift. It is otherwiſe where a donor reſumes a part of his gift; or where the *heirs* of a donor who had made the gift upon his death-bed reſume *two thirds* of his gift after his deceaſe: for if a perſon, upon his death-bed, make a gift or appropriation of the whole of his property, and the heirs reſume two thirds, ſtill the gift or appropriation are not rendered void, becauſe, in this inſtance, the ſeparation into indefinite diviſions is *ſupervenient*, and not *aſſociated*; that is, at the time of the gift or appropriation the article was not divided into undefined portions, but became ſo afterwards. If, however, it ſhould appear that another is entitled to a portion of the land, of a *ſpecific* and not an *undefined* nature, in this caſe the appropriation is not void with reſpect to the remainder, becauſe of no indefinite diviſion exiſting in this inſtance: and gifts and charitable donations are alſo ſubject to the ſame analogy.

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* Arab. *Akkâr*; meaning any immoveable property whatever, whether *lands* or *tenements*. *Zimeen* is the term in the *Perſian* verſion, and the tranſlator therefore renders it *land* throughout.

The *objects* of an appropriation muſt be

nature.

An appropriation is not complete, according to *Haneefa* and *Mohammed*, unleſs the appropriator deſtine its ultimate application to objects not liable to become extinct; as where, for inſtance, a man deſtines its application ultimately to the uſe of the *poor*, (by ſaying "I appro-" priate this to ſuch a perſon, and after him to the *poor*,")—becauſe theſe never become extinct. *Aboo Yooſaf* maintains that where the appropriator names an object liable to termination (as if he were to ſay "I have appropriated this to *Zeyd*,) it is valid, and after the death of *Zeyd* it paſſes, as an appropriation, to the poor, although the appropriator had not named them. The argument of *Haneefa* and *Mohammed* upon this point is that appropriation requires an *extinction* of right of property, without a *transfer* of it; and as this, like manumiſſion, is of a perpetual nature, it follows that if a thing be appropriated to a finite object, the appropriation is imperfect; whence it is that an appropriation is rendered void by making it *temporary*, in the ſame manner as a *ſale* is made void by limiting its duration.

Objection.—This argument of *Haneefa*, that the right of property becomes extinct without "a transfer of it," contradicts what was formerly ſaid, that, "according to *Haneefa*, in appropriation the "right of property is not extinguiſhed."

Reply.—There are two reports from *Haneefa* upon this ſubject. One of them is that which was before ſtated. Another makes the

opinion

opinion of *Haneefa* to agree with that of *Mohammed.* Some alſo allege, in reply to this objection, that what is here advanced from him proceeds upon a ſuppoſition of the magiſtrate having decreed the appropriation to be *abſolute*, under which circumſtance it paſſes out of the poſſeſſion of the appropriator according to all our doctors. —The argument of *Aboo Yooſaf* is that the deſign of the appropriator is to perform an act of piety acceptable to God; and this is fully anſwered in either caſe; becauſe piety on ſome occaſions may conſiſt in the appropriation of an article to a *terminable* object,—and it may at other times conſiſt in the appropriation of a thing to an *in*terminable object;—the appropriation, therefore, is equally valid in both inſtances. Now ſome ſay that *perpetuity* is eſſential to it. *Aboo Yooſaf*, however, does not conſider the mention of perpetuity as an eſſential, as the terms *appropriation* or *charity* do clearly argue thus much, according to what was before advanced, that "Appropriation, like manumiſſion, ſignifies an *extinction* of a right of property without a "*transfer* of that right." According to *Mohammed*, on the other hand, the mention of perpetuity is an eſſential; becauſe appropriation is a charitable donation of the uſe of a thing, or of actual product; and as thoſe are ſometimes temporary and ſometimes perpetual, the general mention of it cannot be underſtood as a perpetuation: it is therefore indiſpenſable that perpetuity be expreſsly mentioned.

Appropriation of *im*- and of *moveable* property.

The appropriation of *land* is lawful; becauſe ſeveral of the prophet's companions appropriated their lands: but the appropriation of *moveable* property is altogether unlawful, whether purpoſely, or as a dependant. This is the opinion of *Haneefa*. *Aboo Yooſaf* alleges that if a perſon appropriate lands, together with the cattle and ſlaves attached to them, it is lawful; and the ſame of all inſtruments of huſbandry; becauſe thoſe are all dependants of the ſoil in the fulfilment of the deſign; the appropriation of theſe, therefore, as dependants of the land, is lawful; for many things are admiſſible *dependantly*, which are not ſo *poſitively*; thus the ſale of *wine* (for inſtance) *by itſelf*

ſelf is unlawful, whereas, *along with land* it is lawful,—and in the ſame manner the appropriation of the beam of a houſe is unlawful, whereas *along with* the houſe it is clearly legal. The opinion of *Mohammed*, alſo, accords with that of *Aboo Yooſaf* in this point, becauſe as he holds the appropriation of moveables to be lawful merely in virtue of the appropriator's declaration, it follows that he admits the appropriation of them *as a dependant* to be legal *a fortiori*. *Mohammed* is alſo of opinion that if a perſon appropriate *horſes*, *camels*, or *arms*, to carry on war againſt infidels, it is lawful;—in which opinion, (as lawyers report,) *Aboo Yooſaf* coincides with him. This proceeds upon a favourable conſtruction; for analogy would ſuggeſt that ſuch an appropriation is unlawful, for the reaſons already alleged. The reaſon for a more favourable conſtruction, however, is that the prophet once ſaid "KHÂLID *has appropriated his* HORSE *and* ARMOUR "*in the way of* GOD;—and TELLIHA *has appropriated his* HORSE *in* "*the way of* GOD *."—According to *Mohammed*, the appropriation is lawful of all moveables, the appropriation of which is commonly practiſed, ſuch as *ſpades*, *ſhovels*, *axes*, *ſaws*, *planks*, *coffins* (and their appendages) *ſtone or brazen veſſels*, and *books*: but according to *Aboo Yooſaf* it is unlawful; becauſe analogy cannot be abandoned but on the expreſs authority of the ſacred writings; and as *horſes* and *armour* only are there mentioned, the admiſſion muſt be reſtricted accordingly. *Mohammed* ſays that analogy may be abandoned on account of *utility*, (as in *arts* or *manufactures*, for inſtance;) and utility exiſts in the articles in queſtion. It is, moreover, recorded of *Naſſeer Ibn Yehee* that he appropriated his books, as conceiving that to be analogous to the appropriation of a KORAN: (in other words, as the appropriation of a KORAN is lawful, ſo alſo is the appropriation of any other book:) and this is approved, becauſe other books as well as KORANS are kept for the purpoſe of reading and inſtruction. Moſt lawyers have paſſed decrees according to the opinion of *Mohammed* in this particular. It is written in the *Fatâvee-Kâzee-Khân* that there is a difference of nion between the *Elders* concerning the appropriation of books.—*Fikkea-Aboo-al-Seyb*, however, holds it to be lawful; and decrees paſs accordingly.

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* That is, *in waging war againſt the infidels.*

The appropriation of articles in which it is not cuſtomary is unlawful.

It is not lawful to appropriate moveables, the appropriation of which is unuſual or uncommon, according to our doctors. *Shafeï* alleges that the appropriation is lawful of every thing which admits of the uſe without a deſtruction of the ſubject, or of every thing lawfully ſaleable, becauſe ſuch articles as admit uſufruct reſemble *land*, *horſes*, or *arms*. The argument of our doctors is that appropriation requires *perpetuity*, according to what has been already ſtated; and this cannot exiſt in *moveables*, ſince theſe are not of a laſting nature: analogy therefore ſuggeſts that the appropriation of moveables *in general* is unlawful:—it is admitted, however, ~~in ſome articles, (although contrary to analogy,)~~ becauſe of the traditions already recorded,—and in other articles (ſuch as *axes*, *ſaws*, and ſo forth,) becauſe of *utility*: but the appropriation of furniture, clothes, and ſlaves, is unlawful, as being contrary to the ſuggeſtions of analogy, becauſe they have neither tradition nor utility to ſupport the legality, and therefore reſemble *dirms* and *deenars*. With reſpect to what *Shafeï* has advanced that "thoſe articles are analogous to *lands*, *horſes*, and *armour*," we reply that no analogy can be admitted between them; becauſe land endures perpetually; and horſes and armour are inſtruments of war againſt infidels, which is among the higheſt religious obligations, whence the property of *piety* exiſts in the appropriation of theſe articles in a much ſtronger degree than in the appropriation of other moveables;—the analogy, therefore, is not allowed.

An appropriation cannot be *ſold* or *transferred*;

Upon an appropriation becoming valid and abſolute, the ſale or transfer of the thing appropriated is unlawful, according to all lawyers: the *transfer* is unlawful, becauſe of a ſaying of the prophet, "*Beſtow the* ACTUAL LAND ITSELF *in charity, in ſuch a manner that it ſhall no longer be ſaleable nor inheritable.* An appropriation, therefore, where it con

fore, is incapable of ſale or transfer, upon becoming valid and abſolute. If, however, the appropriation conſiſt of an undefined part of any thing, and (in conformity with the doctrine of *Aboo Yooſaf*) become abſolute, and the partner require it to be divided off, ſuch diviſion is lawful; becauſe *diviſion* implies *ſeparation* and *diſtinction.* In all things, indeed, except thoſe which are computable by weight or meaſure, *exchange* chiefly prevails: in *appropriation*, however, a ſuperior regard is had to ſeparation and diſtinction, in order that the appropriation may be valid: the dividing it off, therefore, is not to be regarded in the light of a ſale or transfer, and is conſequently legal.

If a perſon appropriate his ſhare in partnerſhip lands, *he* muſt divide it off and detach it from thoſe of his partner; becauſe he alone has authority to do this during his life, or his executor, after his deceaſe. If, on the other hand, a perſon appropriate the *half* (for inſtance) of his *own* land, in this caſe the *Kâzee* is to divide it off, and alienate it from the appropriator:—(or the appropriator may ſell one half (for inſtance) of his land to any other perſon, and then divide off the portion appropriated and alienate it from that perſon, and afterwards repurchaſe the remainder from the purchaſer*:)—for the appropriator is not at liberty himſelf to divide off the portion of land which he has appropriated, or to ſeparate it from that portion which he has *not* appropriated, becauſe *one* perſon is incapable of *himſelf* making a diviſion and thus giving *to himſelf*, ſince diviſion can take place only between *two*.

In
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the
of a balance
made *by* the
appropriator

If, in dividing off appropriated land, any *balance* occurs, (as where a perſon appropriates his ſhare in partnerſhip land, and he and his partner accordingly make a diviſion of the land, and the ſhare of one of them proves defective, and the other makes up the difference by a payment in money,) it is unlawful, where this balance is paid to the

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* This is merely a *device*, for the purpoſe of obviating legal objections.

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of an appropriated article is unlawful: but if it is the *appropriator* who pays the balance, it is lawful,[*] and what he gets in return is his property;—if, therefore, he be deſirous of having it divided off from the part he has appropriated, he muſt refer the matter to the *Kâzee*, in order that he may ſeparate the portion appropriated from what he [the appropriator] gets in return for the balance.

The income of an appropriation muſt be expended (in the *firſt* inſtance) upon keeping it in repair;

It is incumbent that the income of an appropriation be in the firſt inſtance expended in the repairs[*] of it, whether the appropriator may have ſtipulated this or not; becauſe his deſign was that the income ſhould ſerve as a perpetual fund; and as a perpetual income cannot be drawn from the article appropriated unleſs it be preſerved in continual repair, that is a neceſſary attendant upon it; and alſo, becauſe all acquiſition muſt be attended with expence,—(in other words, he who enjoys the profit muſt alſo bear the loſs.)—In ſhort, upon the perſon to whom the advantage of a thing accrues muſt reſt the inconveniencies attending it; and ſuch being the caſe, it follows that the repair of an appropriation reſembles the ſubſiſtence of a ſlave whoſe ſervice has been bequeathed to any one, for the ſubſiſtence of ſuch ſlave reſts upon the legatee of uſufruct. If, therefore, the appropriation be to the *poor*, and the requiſition of repairs from them be impoſſible, (becauſe of the appropriation itſelf being their ſole dependance,) the repairs muſt be afforded out of the income ariſing from it. If, however, the appropriation be to ſome particular perſon, in the firſt inſtance, and after him to the poor, the repairs are in this caſe out of that perſon's property, (but he is at liberty to furniſh the means out of whatever part of his property he chooſes,) during his life; and in this caſe no part of the income is laid out in repairs, be-

the appropriatee be *rich*, in which

the repairs;

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[*] Arab. *Tameer:* meaning, *the rendering a place habitable*, by *cultivation*, if it be or by *rebuilding*, &c. if it be *houſes*.

from the perſon who enjoys the benefit is in ſuch poſſible, ſince he is ſpecified and known. It is to be underſtood, however, that the repairs are to be made out of the property, only in ſuch a degree as may be requiſite to preſerve it in the ſtate in which it was appropriated: if, alſo, it fall to ruin [or *run waſte*] it is to be reſtored to the ſtate in which it was appropriated, becauſe the income of it was made over to others, and was to be derived from it *as in* THAT *ſtate*, and not *as in any ſuperior ſtate*; and as ſuch income is the right of him to whoſe uſe it is appropriated, it is not lawful, without his permiſſion, to expend it in repairs to a degree beyond the original ſtate of the appropriation. Some are alſo of opinion that the ſame rule obtains where the appropriation is to the *poor at large*, and not to any *particular individual*,—that is to ſay, the income is not to be expended in repairs beyond the original ſtate of the appropriation. Others allege that this is lawful. The former, however, is the better opinion; becauſe the income ariſing from an appropriation is expended in the repairs of it only from the neceſſity of preſerving it as it was originally, and there is no neceſſity for repairs
may ſuffice for this purpoſe.

but in ſuch a degree, only, as may ſuffice to preſerve it in its original ſtate.

If a perſon appropriate a *houſe*, with this condition, that his *ſon* or any other perſon ſhall reſide therein during life, the repairs are incumbent upon him who has the right to inhabit it, becauſe he who enjoys the profit muſt alſo bear the loſs, (as has been already ſtated,) and the caſe conſequently reſembles the ſubſiſtence of a ſlave whoſe ſervice has been bequeathed to any perſon by his maſter. If, therefore, the perſon in queſtion refuſe or neglect to repair the houſe, or be incapable of ſo doing, from poverty, the magiſtrate muſt in this caſe let it, and provide for the repairs out of the rent; and muſt return it to him upon the repairs being completed; becauſe, by this means attention is paid to the rights both of the appropriator and of the perſon to whoſe uſe it is appropriated, ſince, if it were not duly repaired, the tenement would be loſt, and the rights of both would be conſequently

The repairs of a *houſe* are incumbent upon the *individual occupant pro tempore*;

or if he neglect this, the

furniſh the repairs out of the rent:

but the occupant is not liable to any *compulſion*;

deſtroyed; the repair muſt therefore be provided out of the rent, in order that the rights of the parties may be ſecured. It is to be obſerved, however, that where the perſon to whom the article is appropriated *refuſes* to make the repairs, he is not to be *compelled*, becauſe the repairs would be at his loſs, his caſe being the ſame as that of the proprietor of the ſeed, in a contract of cultivation, who, if he refuſe to cultivate the land, is not liable to any compulſion, as the cultivation cannot be effected without the loſs of his property, namely the *Seed*.

Objection.—Upon the occupant refuſing to make the repairs, it would appear that the magiſtrate ſhould not return the houſe to him after the repairs are completed; becauſe, as he thus aſſented to the deſtruction of his right, any attention to that is unneceſſary.

Reply.—The refuſal of the occupant to repair the houſe does not argue his aſſent to the deſtruction of his right, as there is a doubt with reſpect to the *motive* of his refuſal, ſince it is poſſible, that he has refuſed merely on account of the expence to his property; his right, therefore, is not deſtroyed, becauſe of the doubt.

and none can let the houſe but the *magiſtrate*.

—It is proper to obſerve that it is not lawful for the *occupant* to let the houſe, ſince he is not the *proprietor*. The *magiſtrate*, on the contrary, poſſeſſes a general power, as being the agent of the community.

materials are to be uſed for repairs.

Such buildings or materials of an appropriation as become damaged or uſeleſs, muſt be employed by the magiſtrate in the repairs of it, where neceſſary; and if theſe be not immediately neceſſary, he muſt keep the articles in queſtion until ſuch time as occaſion offers, when he muſt employ them in making the neceſſary repairs; as repairs are required from time to time, in order that the appropriation may be continually preſerved, and the deſign of the appropriator anſwered. If the materials of the decayed place be damaged ſo much as to render it impracticable to employ them in the repairs, (by the *timbers* being *broken*, for inſtance,) it is incumbent on the magiſtrate to ſell them, and expend the price in ſuch repairs: but it is not lawful for him to give them to the occupants, becauſe the timbers, and ſo forth, are conſtituent parts of the actual appropriation, in which no perſon has any right,—their right being merely to the *uſe*, and not to the thing itſelf.

Caſe of appro-

during life;

If a perſon appropriate an *houſe* (for inſtance,) with a reſerve of the income to his own uſe during life, and after his death to go to the poor, this is lawful, according to *Aboo Yooſaf.* Our author remarks that this is deemed lawful by *Aboo Yooſaf*; but that, judging from the opinion of *Mohammed*, it is unlawful;—and ſuch is the opinion of *Hillal Kâzee* and *Shafeï* reſpecting it. Some allege that the difference between *Aboo Yooſaf* and *Mohammed* upon this point is occaſioned by their difference of opinion concerning the neceſſity of *conſignment*; for, according to *Mohammed*, the conſignment of the appropriation to the *Mootwalee*, or procurator, is an eſſential, and conſequently it is unlawful for the appropriator to reſerve the income to himſelf: according to *Aboo Yooſaf*, on the contrary, this is lawful, as he does not hold the conſignment to a procurator to be an eſſential. Others, again, allege that their difference upon this point is not occaſioned by their difference upon any other point, but is merely an original difference of opinion with reſpect to the preſent caſe itſelf. This difference of opinion between the diſciples ſubſiſts in every caſe, that is, whether the appropriator reſerve the *whole* or a *part* only of the income to himſelf during life, and after his death to go to the poor. If, alſo, the appropriator reſerve the whole or part of the income from his appropriation to the uſe of his *Am-Walids*, or his *Modâbbirs*, during their lives, and after their deaths deſtine it to the poor, ſome ſay that this is lawful according to all our doctors. Others, however, maintain that, in this inſtance alſo, the above difference of opinion obtains: and this is approved, becauſe his reſerving the income to *their* uſe for their lives is equivalent to his reſerving it to *his own* uſe. The argument in favour of *Mohammed*'s opinion is that appropriation is a *gratuitous act*, effected in the transfer of a property to God, by delivering

over the thing appropriated to a *Mootwalee* or procurator; (for a
to the Almighty, who is himſelf the proprietor of all things,
it cannot be effected *actually* and *expreſsly*, yet may be ſo
and the reſerving of the whole or part of the income ariſing from it to his own uſe is repugnant to this, becauſe, the delivery cannot be made to *himſelf*.—The caſe, therefore, reſembles the reſerve of an *alms-gift*,—and alſo the reſerve of a part of a moſque:—in other words, if a perſon were to aſſign certain property to the poor, ſtipulating at the ſame time, that his right in part of it ſhould continue, the alms under ſuch a condition are unlawful;—or, if the founder of a moſque ſtipulate that his right in a part of the moſque ſhall continue, this oppoſes the legality of the whole foundation:—and ſo alſo in the caſe in queſtion. The arguments of *Aboo Yooſaf* upon this point are threefold. FIRST, the prophet was accuſtomed himſelf to conſume the revenue ariſing from what he had appropriated. Now the uſe would not at any rate be lawful, unleſs the appropriator had previouſly ſtipulated it for himſelf at the time of appropriation; the prophet conſuming the revenue, therefore, argues that it is lawful for an appropriator to reſerve that to his own uſe. SECONDLY, *appropriation* implies the owner of a property deſtroying his right in that property by a transfer of it to GOD, under ſome pious intention, (as was formerly ſtated;) and ſuch being the caſe, where an appropriator reſerves a part or the whole of the revenue ariſing from what he appropriates to his own uſe, it follows that, in ſo doing, he reſerves to himſelf a thing which is *the property of* GOD, (*not* that he reſerves to himſelf what is *his own*;) and a perſon's reſerving to himſelf a thing which is the property of GOD is lawful; thus, if a man build a *caravanſera*, or conſtruct a reſervoir, or give ground for a burial-place, reſerving to *himſelf* the right of reſiding in the *caravanſera*, or of drinking water out of the reſervoir, or of interment in the burial-place, it is lawful; and ſo likewiſe in the caſe in queſtion.—THIRDLY, the deſign, in appropriation, is the performance of an act of piety: and piety is conſiſtent with the circumſtance of a perſon reſerving the revenue to his own

uſe, as the prophet has ſaid "*A man giving a ſubſiſtence to* HIMSELF *is* "*giving* ALMS[*]."

or, with a reſerve of a liberty to change the *ſubject*;

IF the appropriator reſerve to himſelf a right of changing the lands he appropriates for any other lands, at pleaſure, it is lawful, according to *Aboo Yooſaf*. *Mohammed* maintains that the appropriation itſelf is valid, but that the condition reſerved is void; becauſe the condition does not prevent an extinction of right of property; and the appropriation is conſequently complete, becauſe of the extinction of this right; but the *condition*, as being invalid, is void, in the ſame manner as the reſerve of a right of change, in the foundation of a moſque, is void.

or, with a reſerve of a right of option;

IF the appropriator reſerve to himſelf a right of option with reſpect to his appropriation, for three days, by ſaying (for inſtance) "I appropriate this houſe to ſuch and ſuch purpoſes, with this con-"dition, that I ſhall have a right of option for three days;" according to *Aboo Yooſaf* both the appropriation and the condition are lawful. According to *Mohammed*, on the contrary, the appropriation is null. Their difference of opinion upon this point originates in the difference of their doctrine reſpecting a reſerve of the revenue of an appropriation to the uſe of the *appropriator*: for as, according to *Aboo Yooſaf*, an appropriator may lawfully reſerve to his own uſe, during life, the revenue ariſing from what he appropriates, it follows that he deems it lawful that the appropriator reſerve a right of option for three days, for the purpoſe of conſideration. *Mohammed*, on the other hand, holds that the poſſeſſion of a *Mootwalee* or procurator, is an eſſential, and as a reſerve of option prevents poſſeſſion from being completely taken, it follows that, according to him, the appropriation is void. An appropriation, moreover, is not complete without the will of the appropriator; and as, where he makes a reſerve of option, this cannot be aſcertained, it follows that the appropriation is void; and being once *void*, its validity cannot afterwards be reſtored by the condition ceaſing to operate.

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[*] As where (for inſtance) a man appropriates *the whole* of his property, thus reducing himſelf to poverty; in which caſe the charity is as effectual with reſpect to *him* (where he neceſſarily reſerves a ſufficiency from the product for his own ſuſtenance) as with reſpect to *any other pauper*.

or with a reſerve of *authority.*

If a perſon appropriate land, with a reſerve of his authority over it, it is lawful, according to *Aboo Yooſaf.*—Our author remarks that *Kadooree* has expreſsly declared this. Such alſo is the doctrine of *Hillâl*: and it is, indeed, the generally received opinion. *Hillâl* particularly mentions it in treating of appropriations. Some doctors allege, that if the appropriator particularly ſtipulate a reſervation of authority over the lands, this authority remains to him accordingly; but not unleſs it be particularly ſtipulated by him. Our modern doctors, however, conſider it as very doubtful whether this be an opinion of *Mohammed*, becauſe it is a tenet of his that delivery into the hands of a procurator is eſſential to the validity of an appropriation; and where ſuch delivery takes place, the appropriator can no longer poſſeſs any authority over it. According to the tenets of *Aboo Yooſaf*, on the other hand, the delivery to a procurator is not an eſſential, and conſequently the authority remains with the appropriator, although he ſhould not have ſo ſtipulated. What was mentioned above, concerning the opinion of *Mohammed*, that "where the delivery to a "procurator takes place, the appropriator can no longer retain any "authority over the appropriation," applies to a caſe where the appropriator had not ſtipulated any reſervation of authority to himſelf at the *firſt*;—for if he had ſtipulated this at the time of making the appropriation, his authority is not rendered void by delivery to a procurator; becauſe as *his* authority continues where he ſtipulates a right of authority in behalf of *another*, it follows that, where he ſtipulates it in behalf of *himſelf*, it continues *a fortiori.*—The arguments in ſupport of the opinion of *Aboo Yooſaf*, (which is the moſt generally received doctrine,) are twofold. **First**, the procurator enjoys his authority, only on behalf of the approriator, in conſequence of his reſervation; and it is impoſſible that the appropriator himſelf ſhould not be poſſeſſed of any authority, at the ſame time that another perſon enjoys an authority held on his behalf.—**Secondly**, the appropriator ſtands in a nearer relation to what he appropriates than any other perſon, and it is conſequently proper that he poſſeſs an authority over it; in the ſame manner as where a perſon builds a moſque, in which caſe the buſineſs of repairing it, as well as the appointment of all the officers, &c. appertains ſolely to him; or as where a perſon emancipates a ſlave, in which caſe the *Willa* appertains ſolely to him, as he ſtands in a nearer relation to the ſlave than any other perſon.

If, however, the appropriator who makes this condition, (namely, a reſervation of authority to himſelf,) be a perſon of infamous character and unworthy of confidence, the magiſtrate may take the appropriation out of his hands, from a regard to the intereſt of the poor; in the ſame manner as he is at liberty to ſuſpend the powers of an *executor*, where he happens to be a perſon of bad character, from a regard to the intereſt of the orphans. If, alſo, an appropriator conſtitute another the *Mootwalee* or procurator, declaring that "the ſovereign "or magiſtrate ſhall not take the appropriation out of his charge," yet theſe are at liberty to take it from him, where he happens to be a perſon of bad character;—becauſe, as ſuch a declaration is repugant to the precepts of the LAW, it is conſequently void.

SECTION.

If a perſon build a moſque, his right of property in it is not extinguiſhed ſo long as he does not ſeparate it from the reſt of his property,

not alienated from the

founder, otherwiſe than by the

perty, or give general admiſſion to people to come and worſhip in it: but as ſoon as the people in general, or a ſingle perſon, ſay their prayers in it, his right of property is extinguiſhed, according to *Haneefa.* The utter ſeparation of it from the reſt of the appropriator's property is indiſpenſable, for this reaſon, that the moſque cannot become dedicated ſolely to God until that be effected: and the performance of *prayer* in it is a condition; becauſe, as a conſignment (according to *Haneefa* and *Mohammed*) is indiſpenſable, it follows that conſignment is requiſite in this way, ſince conſignment muſt be carried into execution in whatever way may be proper to the nature of the appropriation, and the mode of conſignment proper to a moſque is *public worſhip*; or, the performance of prayer is a condition, becauſe as it cannot be conceived that God *himſelf* ſhould take poſſeſſion of a moſque, it follows that that which is the *deſign* muſt ſtand as a ſubſtitute for the *taking poſſeſſion* of it. It is proper in this place to obſerve that if a *ſingle perſon* ſay his prayers in the moſque it ſuffices, (according to one report from *Haneefa* and *Mohammed*;) becauſe, as it is impoſſible that *all* men ſhould perform their prayers in it, the circumſtance of a ſingle individual performing his prayers is the condition. It is alſo reported, from *Haneefa* and *Mohammed,* that the performance of prayer by a *whole congregation* is a neceſſary condition, becauſe a moſque is founded with a view to *public worſhip.* *Aboo Yooſaf* maintains that the founder's right of property is deſtroyed immediately upon his ſaying "I conſtitute this a *moſque!*"—becauſe he does not hold conſignment to be a condition, ſince according to him appropriation ſignifies a *relinquiſhment of right on the part of the individual*; the thing appropriated, therefore, appertains ſolely to God merely in conſequence of the right of the individual ceaſing,—as was before demonſtrated.

Caſes of a *moſque,* as

If a perſon erect a building of two ſtories, making the under ſtory a moſque, and the upper ſtory a dwelling, or *vice*
the door of the moſque towards the public road, and detach the

moſque from his own property [in the manner before deſcribed,] he is nevertheleſs at liberty to ſell it;—or, if he die, the moſque is an inheritance;—as the moſque does not, in this inſtance, appertain ſolely to God, becauſe of the individual's right in it ſtill ſubſiſting. This, however, is only where the dwelling has not been conſtructed merely for the purpoſes of the moſque; for if it have been conſtructed for the purpoſes of the moſque, (as in the great moſque at *Jeruſalem*,) the appropriation is abſolute. *Haſan* reports, from *Haneefa*, that if the lower ſtory be a moſque, and the upper ſtory a dwelling, the former continues for ever a moſqe; becauſe a moſque is one of thoſe things which are deſigned to continue in perpetuity, and an *under* ſtory anſwers this purpoſe better than an *upper* ſtory. The *reverſe* of this is reported from *Mohammed*, becauſe *reverence* is indiſpenſably due to a moſque, and where an upper ſtory is conſtructed over a moſque, for the purpoſe either of dwelling in, or of letting out to hire, this reverence cannot be obſerved. It is recorded, alſo, that when *Aboo Yooſaf* went to *Bagdad*, and beheld the narrow, and crowded condition of the place, he held the appropriation to be lawful and abſolute in either caſe,—that is, whether the moſque be in the *lower* ſtory and the dwelling in the *upper*, or *vice verſa*:—but this he admitted out of neceſſity. The ſame is recorded of *Mohammed*, when he went to *Râi**, and for the ſame reaſon.

If a perſon convert the center hall of his houſe into a moſque, giving general admiſſion into it, ſtill it does not ſtand as a moſque, but remains ſaleable and inheritable;—becauſe a moſque is a place in which no perſon poſſeſſes any right of obſtruction;—and wherever a man has ſuch a right with reſpect to the ſurrounding parts, the ſame muſt neceſſarily affect the place incloſed in them; this place, therefore, cannot be a *moſque*:—beſides, it is neceſſarily a thoroughfare for the family, and conſequently does not appertain ſolely to God. It is reported from *Mohammed* that the center hall of a houſe, thus conſtituted a moſque, cannot afterwards be given away, ſold, or inherited: he conſequently conſiders it to ſtand as a *moſque*;—and *Aboo Yooſaf* is of the ſame opinion;—becauſe, as the perſon in queſtion was deſirous that this place ſhould become a *moſque*, and as it cannot become ſo without a road, or entrance into it, the road is included without ſpecification, in the ſame manner as in a caſe of *hire*.

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* The capital of *Irâk*, (the ancient *Chaldea*.)

Ground appropriated to building a *moſque* cannot be *ſold* or *inherited*.

If a perſon appropriate ground for the purpoſe of erecting a moſque, he cannot afterwards reſume or ſell it, neither can it be inherited, becauſe this ground is altogether alienated from the right of the individual, and appertains ſolely to God. The reaſon of this is that all things whatever are originally the property of the Almighty: when, therefore, the individual relinquiſhes his right in the ground, it reverts to its original ſtate, and his power over it terminates; in the ſame manner as a maſter's power over a ſlave terminates in conſequence of manumiſſion, and cannot be reſumed.

A *moſque* cannot, in any inſtance, revert into the property of the *founder*.

If the place in which a moſque is ſituated ſhould become deſerted or uninhabited, inſomuch that there is no farther uſe for the moſque, no perſon coming to worſhip therein, ſtill it continues to ſtand as a *moſque* (according to *Aboo Yooſaf*,) and does not revert to the founder; becauſe, as he had put it out of his own poſſeſſion, it cannot again become his property. *Mohammed* alleges that the moſque again becomes the property of the founder, or of his heirs, in caſe of his deceaſe; becauſe he had erected it for the purpoſe of public worſhip; and as that has ceaſed, the moſque is in the ſame predicament with the materials for building a moſque: In other words, if there be no farther occaſion for materials (ſuch as bricks and ſo forth) deſigned for the erection of a moſque, they revert to the founder, and ſo alſo in the caſe in queſtion. This, however, is a concluſion which does not accord with the doctrine of *Aboo Yooſaf*, for he holds that where there is no farther occaſion for thoſe materials in the conſtruction of moſque, they muſt be carried to *another*.

Caſes of appropriations made to the uſe of the *community at large.*

If a perſon conſtruct a reſervoir for public uſe, or a *caravanſera* for travellers, or erect a houſe upon the infidel frontiers for the accommodation of the *Muſſulman* warriors in their excurſions, (which is termed a *Ribât*,) or dedicate ground as a burying-place, his right of property therein is not extinguiſhed until the magiſtrate iſſue a decree to that effect;—becauſe no termination of the proprietors right takes place in this inſtance, inſomuch that he may ſtill lawfully continue to uſe thoſe things, (by reſiding in the houſe or *Ribât*, or drinking water out of the reſervoir, or interring in the burial-place.) It is therefore requiſite either that the magiſtrate iſſue a decree, in order to complete the alienation, or that the founder himſelf refer the appropriation to his deceaſe, in order that it may ſtand as a *bequeſt*, and become abſolute upon that event;—in the ſame manner as in the caſe of an appropriation made to the uſe of the *poor*. It is otherwiſe in the caſe of a moſque, becauſe in that inſtance no right of uſufruct remains to the founder, as the moſque appertains ſolely to God independent of any magiſterial decree. All that is here advanced is according to *Haneefa*. *Aboo Yooſaf* is of opinion that the perſon's right of property ceaſes on the inſtant of his ſaying "I have made "this for ſuch and ſuch purpoſes," (of reſidence, interment, or ſo forth,) becauſe with him it is a rule that appropriation is abſolute, and that conſignment is not a condition of it. *Mohammed* maintains that as ſoon as people drink water out of the reſervoir, or enter the *Caravanſera*, or warriors take up their reſidence in the *Ribât*, or interment takes place in the burying-ground, the proprietor's right is extinguiſhed; becauſe conſignment (which he holds to be a condition) is eſtabliſhed by ſuch acts, as the conſignment of any thing muſt be made in the mode proper to that thing. It is ſufficient alſo, (according to him,) if theſe acts be performed by, or with reſpect to, only a *ſingle individual*; becauſe as the *whole community* cannot engage in thoſe acts, regard muſt neceſſarily be had to them as performed in any ſingle inſtance. Wells and fountains are alſo ſubject to the ſame rule.

They may be conſigned to a procurator.

If, in the caſes laſt recited, the founder conſign the article to a *Mootwalee* or procurator, ſuch conſignment is approved, becauſe the procurator is in the character of a deputy, and the act of the deputy is the act of the principal. With reſpect to a moſque, indeed, ſome allege that the delivery of it to a procurator is not a complete conſignment, becauſe there is no buſineſs for a procurator in a moſque. Others again ſay that conſignment is eſtabliſhed, as it is neceſſary, in a moſque, that there be ſome perſon to keep it in order, and lock up the doors; the conſignment of a moſque, therefore, to a procurator, is approved. Some alſo aſſert that a burying-ground is conſidered in the ſame light as a moſque in this particular, becauſe the procurator of a burying-ground is an office not in uſe. Others, again, maintain that it reſembles a reſervoir, or *caravanſera*; if, therefore, it be delivered to a procurator, conſignment is eſtabliſhed; becauſe ſuch an appointment is valid although it be contrary to general uſage.

Appropriations may be conſigned to the prince or chief magiſ-

If a man, having a houſe in *Mecca*, appropriate it to the accommodation of pilgrims, or, if a perſon, having a houſe in any other place, appropriate it to the accommodation of the poor, or mendicants, or, having a houſe upon the frontiers, dedicate it to the accommodation of the *Muſſulman* warriors and their cattle, or dedicate the revenue from his lands to the ſupport of the warriors in the way of God*, and make over or conſign thoſe houſes or lands to the prince, (who is impowered to act in thoſe particulars,) ſuch conſignment is lawful. If, therefore, the perſon in queſtion be afterwards deſirous of revoking his appropriation, he cannot lawfully do ſo, for the reaſons before alleged. The revenue ariſing from the lands, however, is lawful to the *poor only*, and not to the *rich*:—but the uſe of any of the other articles (ſuch as reſiding in the *caravanſera*, or drinking water from the well, fountain, or reſervoir,) are lawful to *rich* a

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* That is, *engaged in war againſt the infidels.*

The reaſons of this diſtinction are twofold. First, people in general, in the appropriation of a revenue, intend only the relief of the needy, whereas, in that of the other articles, the accommodation of rich and poor is equally intended. Secondly, the articles of drink and lodging are requiſite, equally, to the rich and to the poor; but in the article of pecuniary aſſiſtance the rich are not neceſſitous, on account of their wealth, whereas the poor are neceſſitous.

HEDAYA.

BOOK XVI.

Of SALE.

Definition of the terms uſed in ſale.

BEEYA, or *ſale*, in the language of the LAW ſignifies an *exchange of property for property with the mutual conſent of the parties. Shirra* ſignifies *purchaſe.* The ſeller is termed *Bâyee:* the purchaſer *Mooſhterree:* the thing ſold *Moobea:* and the price *Simmin.*

Chap. I. Introductory.
Chap. II. Of Optional Conditions.
Chap. III. Of Option of Inſpection.
Chap. IV. Of Option of Defect.
Chap. V. Of *invalid, null,* and *abominable* Sales.
Chap. VI. Of *Akâla*, or the *diſſolution* of Sales.
Chap. VII. Of Sales of *Profit* and of *Friendſhip.*
Chap. VIII. Of *Ribba*, or *Uſury.*
Chap. IX. Of *Rights* and *Appendages.*
Chap. X. Of Claims of Right.

Sales.

Sale is contracted by *declaration* and

Sale is completed by declaration and acceptance, the ſpeech of the *firſt* ſpeaker, of the contracting parties, being termed the *declaration*, and that of the *laſt* ſpeaker the *acceptance*. Thus, if *Zeid* ſhould firſt ſay to *Omar* "I have ſold to you a particular article belonging to "me for ten *dirms*," and *Omar* ſhould then ſay "I have bought "that article belonging to you for the ſaid price," the ſpeech of *Zeid* is in that caſe termed the *declaration*, and that of *Omar* the *acceptance*. If, on the contrary, *Omar* ſhould firſt ſay to *Zeid* "I have purchaſed "a particular article belonging to you for ten *dirms*," and *Zeid* ſhould then ſay "I have ſold the ſame to you for the ſaid price," the ſpeech of *Omar* is in this caſe termed the *declaration*, and that of *Zeid* the *acceptance*.

expreſſed ei-

It is a neceſſary condition that the declaration and acceptance be expreſſed in the *preſent* or *preterite* tenſe indicative; for if either be expreſſed in the *imperative* or *future* the contract is incomplete. Thus, if the ſeller ſhould ſay to the purchaſer, "Buy this article be-"longing to me for ten *dirms*," and the *purchaſer* reply, "I have "bought the ſaid article for ten *dirms*,"—or, if the ſeller ſhould ſay "I have ſold this article to you for ten *dirms*," and the purchaſer reply "I will purchaſe the ſaid article for ten *dirms*,"—in neither caſe would the ſale be binding.

or by any expreſſions calculated to convey the ſame meaning.

It is to be obſerved that in the ſame manner as a ſale is eſtabliſhed by the words, "*I have bought*," or "*I have ſold*;" ſo alſo is it eſtabliſhed by any other words expreſſive of the ſame meaning;—as if either of the parties, for inſtance, ſhould ſay "I am contented with "this price," or "I have given you this article for a certain price," or "Take this article for a certain price;" becauſe, in ſale, regard is had to the *ſpirit* of the contract, and the particular uſe of the words *bought* and *ſold* is not required; whence it is that ſale may be contracted ſimply by a *Taáta* or *mutual ſurrender*, where the ſeller gives the article ſold to the purchaſer, and the purchaſer in return gives the price to the ſeller, without the interpoſition of ſpeech. Some have alleged that this mode of ſale by a *mutual ſurrender* is valid with relation to things of *ſmall* value; but not otherwiſe. It is, however, certain that ſale by a *mutual ſurrender* is valid in every caſe, as it eſtabliſhes the mutual conſent of the parties.

Objection. It would appear that the ſale, as recited above to be rendered complete by the words "*Take this*," &c. is not valid, as it was before declared to be a neceſſary condition that both *declaration* and *acceptance* ſhould be expreſſed in the *preſent* or *preterite* tenſe indicative, and neither of them in the *imperative*.

Reply.—In this caſe the words "*Take*," &c. are not of themſelves a declaration, but merely indicate the exiſtence of a declaration in the preterite tenſe;—as if the ſeller had firſt ſaid "I have ſold this "thing," and were then to add "Take this," &c. for the command is conſequent to the declaration.

The accept- [illegible] be until the breaking up of the meeting; whether the declaration be made *perſonally*,

If either of the parties make a declaration, it is in the power of the other to withhold his acceptance or refuſal until the breaking up of the meeting; and this power is termed the *option of acceptance* *. The reaſon of this is that if ſuch a power did not reſt in one of the parties, it muſt neceſſarily follow that the ſale would take effect without his conſent. It is to be obſerved, in this inſtance, that as the declaration is not of itſelf efficient to complete the contract, the perſon making the declaration is at liberty to recede from it.

or by *letter*, or *meſſage*.

If either the buyer or ſeller ſhould ſend a *letter* or a *meſſage* to the other, that other has the power of ſuſpending his acceptance or refuſal until he leave the place or meeting where he received ſuch meſſage or letter.

An offer made by the purchaſer cannot be re-

If the purchaſer make a declaration of his purchaſe of merchandiſe at a particular price, the ſeller is not in that caſe entitled to conſtrue his acceptance as limited to a *part* of the merchandiſe only at a rate proportionate to the declaration for the whole;—and, in the ſame manner, if a ſeller ſhould make a ſimilar declaration, the purchaſer is not at liberty to conſtrue his purchaſe after that manner;—becauſe this is a deviation from the terms proffered; and alſo becauſe the declarer has not expreſſed his aſſent thereto. If, however, the perſon who makes the declaration ſhould ſpecify a particular rate, oppoſed to particular parts of the merchandiſe, the acceptance may be limited. Thus if a perſon ſhould ſay "I will ſell this heap of grain for ten "*dirms*," the purchaſer, if he declare his acceptance, is not in that caſe at liberty to limit his purchaſe to *half* the grain for five *dirms*; whereas, if the ſeller ſhould ſay "I will ſell this grain at the rate of "one *man* for a *dirm*," the purchaſer, after declaring his acceptance, may limit his purchaſe to what quantity he pleaſes.

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* Arab. *Khiár-al-Kabool.*

ſtricted, by the ſeller, to any*pa* *part* of the

cular *rate* or *price* to parti- *portions*.

If either a ſeller or purchaſer make a declaration, and one of the parties quit the place before any acceptance be expreſſed, the declaration ſo made is void.

If the acceptance be not expreſſed in due time, the declaration is null.

When the declaration and acceptance are *abſolutely* expreſſed, without any ſtipulations, the ſale becomes binding, and neither party has the power of retracting unleſs in caſe of a defect in the goods, or their not having been inſpected. According to *Shafeï*, each of the parties poſſeſſes the *option of the meeting**,—(that is, they are each at liberty to retract until the meeting break up and a ſeparation take place,) becauſe of a ſaying recorded of the prophet "*The buyer and* "*ſeller has each an option until they ſeparate.*" Our doctors argue that the diſſolution of the contract, after being confirmed by declaration and acceptance, is an injury to the right of one of the parties; and that the tradition quoted by *Shafeï* alludes to the *option of acceptance*, as already explained.

Declaration and acceptance, abſolutely expreſſed, render the ſale binding.

If, at the time of concluding a contract of ſale, either the merchandiſe, or the price, or both, be preſent and alluded to in it, (as if

Where the article and the price are

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* Arab. *Khiâr-al-Majlis.*

both produced, the ſale is complete, without any ſpe- f

the ſeller ſhould ſay "I have ſold this wheat to you for theſe *dirms*," or the purchaſer, "With theſe *dirms* now preſent I have purchaſed "ſuch an article belonging to you,") in this caſe the ſale is valid, although neither the quantity of wheat, (ſuch as "*ſo many loads*," for inſtance,) nor the amount of the money (ſuch as "*ſo many dirms*") be mentioned; for the reference made to them is ſufficient to aſcertain the ſubjects of the contract, and does not leave room for any diſpute.

but a mention of money, without a ſpe- of n- leſs it be produced upon the ſpot,) is not valid.

If, at the time of concluding the contract, the *dirms* or *deenârs* be not preſent, ſo as to admit of being referred to; in this caſe the general mention of them, without a ſpecification of the *numbers* or of the *quality*, is not valid; becauſe the delivery of them on the part of the purchaſer is requiſite; and as the general mention of them would occaſion a contention between the purchaſer and ſeller, (the one wiſhing to give a few and of a bad quality, the other inſiſting on a greater number and a better quality,) the delivery would therefore become impracticable. (It is here proper to obſerve that every ſpecies of uncertainty which may prove an occaſion of contention is invalid, in a contract of ſale.)

A ſale may be entered into, for *money*, or with ſpecification of a iſed of payment.

A sale is valid either for ready money, or for a future payment, provided the period be fixed; becauſe of the words of the *Koran*, "ABSOLUTE SALE IS LAWFUL;" and alſo, becauſe there is a tradition of the prophet having purchaſed a garment from a *Jew*, and promiſing to pay the price at a fixed future period, pledging his coat of mail for the performance of it. It is indiſpenſably requiſite, however, that the period of payment be fixed, as an uncertainty in this reſpect might occaſion a contention, and be preventive of its execution, ſince the ſeller would naturally demand the payment of the price *ſoon*, and the buyer would deſire to *defer* it.

The price muſt be ſtipu-

A sale, ſtipulating a payment of *dirms* in an abſolute manner, (as if a perſon ſhould ſay "I have ſold this for *ten dirms*,") is valid; provided however that all the different ſpecies of *dirms* be of the ſame value: and in that caſe the purchaſer is entitled to pay the price in any of the ſpecies he pleaſes.—If the different ſpecies of *dirms* be of different value, the ſale then reſts upon that which is moſt generally in uſe. If, however, the different ſpecies be of different values, and it be impoſſible to aſcertain the one of moſt common uſe, the abſolute expreſſion of *dirms* in this caſe renders the ſale void, becauſe the price being thereby rendered uncertain, a contention muſt neceſſarily enſue: ſtill, however, if the parties chooſe to remove the cauſe of contention by voluntarily fixing the rate, the ſale is valid.

lated at ſome known and determinate rate.

It is lawful to ſell *wheat*, or other kinds of grain, either by means of meaſures of capacity, or by conjecture*, provided it be in exchange for a different kind of grain; becauſe the prophet has ſaid, "*Sell any thing that is in exchange for a different kind, in whatſoever manner you pleaſe and without regard to the quality*;" and alſo, becauſe the uncertainty in this caſe proves no bar to its delivery. It is not lawful, however, to ſell grain in exchange for the *ſame kind* by conjecture, becauſe this is of an uſurious nature.

Grain may be ſold for other grain of a different ſpecies.

It is lawful, in ſale, to uſe the meaſure of a particular veſſel, of which the exact capacity may not be aſcertained,—or the weight of a particular ſtone, the exact weight of which is not aſcertained,—becauſe the uncertainty in this caſe cannot be productive of contention, ſince either of theſe inſtruments of eſtimation may be uſed and the delivery take place immediately after; and it is not probable that the veſſel or ſtone ſhould be loſt or deſtroyed in the interval between the meaſurement and the delivery, the only caſe in which a contention could ariſe. A meaſurement of this kind, however, is not allowed in *Sillim* ſales (that is, where the price is advanced, and the merchandiſe

Goods may be ſold by a weight or meaſurement which is not of any particular ſtandard,

except in a caſe of *Sillim* ſale.

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* Meaning, by *Eſtimate*.

delivered afterwards,) becauſe in ſuch caſe there is a probability of the veſſel or ſtone being loſt or deſtroyed during the long interval that takes place between the concluſion of the contract and the delivery of the goods; in which caſe, as the parties had no other criterion (during the exiſtence of the ſtone or veſſel) than their *eye-ſight* to judge from, a contention might afterwards ariſe as to the *ſize* or *weight* of the ſtone or veſſel.

A ſale fixing a particular price to each particular part or portion of goods, in the groſs, extends only to *one* ſuch

If a perſon ſell a heap of grain, by declaring "I have ſold this "heap at the rate of one *dirm* for every *Kafeez**," in this caſe (according to *Haneefa*) the ſale takes place in one *Kafeez* only; nor can it extend beyond that quantity, unleſs the ſeller ſhould explain, in the ſame meeting, the ſum of the *Kafeez*'s.—The two diſciples are of opinion that the ſale of the whole is valid in both caſes. The reaſoning of *Haneefa* is that it is impracticable to extend the ſale to the *whole* of the heap, becauſe both the goods to be delivered and the price to be received are in this caſe uncertain: it muſt therefore be conſtrued as exiſting in one *Kafeez*, the only aſcertained quantity. It is rendered valid, however, with reſpect to the *whole* quantity, by the removal of the uncertainty,—that is, by the ſeller either explaining the *total*, or aſcertaining it by meaſurement during the meeting. The argument of the two diſciples is, that the power of removing the uncertainty reſts with the parties: and that the *uncertainty*, in this caſe, ought not to be deemed a bar to the validity of the ſale; in the ſame manner as it is not a bar where a perſon ſells *one ſlave* out of *two*, leaving it in the option of the purchaſer to fix on *either* of them.

and a ſale expreſſing the

If a perſon ſay "I have ſold my flock of goats at the rate of one "*dirm* for each," the ſale in that caſe is altogether invalid,—in other words, it is not extended even to *one goat*,—according to *Haneefa*;

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* A meaſure containing about ſixty-four pounds weight.

and in the ſame manner, the ſale is altogether invalid if a perſon ſell cloth at the rate of one *dirm* the yard, without explaining the number of yards; and the ſame of every other article, ſuch as *wood*, *pots*, or the like.—The two diſciples are of opinion that, in all theſe caſes, the ſale is valid with reſpect to the *whole quantity*; becauſe the removal of the uncertainty is in the power of the parties; and alſo, becauſe ſuch uncertainty does not prevent the validity of the ſale, as is demonſtrated in the preceding caſe. The arguments of *Haneefa* in ſupport of his opinion are alſo the ſame as thoſe advanced by him in the preceding caſe;—in which, however, he has admitted the validity of the ſale with reſpect to one *Kafeez* of wheat, becauſe all *Kafeez*'s of wheat being the ſame, no contention can ariſe in the delivery of it,—whereas, in the caſe in queſtion, the different articles comprehending in themſelves unequal unities, the delivery could not be made without contention.

gether void, unleſs the amount of the whole be ſpecified.

If a perſon purchaſe a heap of grain for one hundred *dirms*, on the condition of the heap amounting to one hundred *Kafeez*'s, and it be afterwards diſcovered to fall ſhort of that amount, in this caſe the purchaſer has the option of either taking the actual amount, at a rate proportioned to the terms of the contract, or of undoing the contract entirely; becauſe a breach of the terms takes place before the deed is rendered complete, ſince, in order to render the deed complete, it is neceſſary that the actual quantity ſtipulated be taken poſſeſſion of. If, on the other hand, the heap be afterwards found to contain an exceſs beyond the ſtipulated amount, the ſale is valid with reſpect to the amount of the one hundred *Kafeez*'s, and the exceſs continues the property of the ſeller; becauſe the ſale is reſtricted to a *ſpecific quantity*; and the exceſs is not included in the deſcription, ſo as to be a *dependant* thereof, and not a *ſeparate* article.

agreed for fall ſhort, the purchaſer may either take it, or undo the contract;

but, if it *exceed*, the ſale is valid to the amount of the quantity bargained for.

If a perſon ſell a piece of cloth for ten *dirms*, on the condition of its contents amounting to ten yards,—or a piece of ground for one

If the tity be of a nature

ble of ſpecification and fall ſhort, the purchaſer may either take it, or undo the bargain:

hundred *dirms*, on condition of its meaſuring one hundred yards,—and a deficiency afterwards appear, the purchaſer has in that caſe the option either of cancelling the bargain entirely, or of taking the ground, or cloth, thus defective, at the ſtipulated price; for the ſpecification of *yards* is a mere deſcription of the *length* and *breadth*; and no part of the price is oppoſed to the *deſcription* of the wares;—in the ſame manner as in caſes with reſpect to *animals*;—in other words, if a perſon purchaſe a *goat*, which afterwards appears to want an *ear*, he would have the option of taking the defective goat for the price ſtipulated, or of undoing the bargain: but he would have no right to diminiſh the price on account of ſuch defect, becauſe no part of the price is oppoſed to the *ear* in particular, ſo as to admit of any fixed diminution on account of its deficiency;—and ſo alſo in the caſe in queſtion. It is otherwiſe in the preceding caſe, relative to *wheat*; becauſe there the deficiency comes under the head of the *quantity* and not the *deſcription* of the wheat; and the price being oppoſed to quantity, a proportionate diminution is accordingly made from it. Still, however, the purchaſer has the option of undoing the contract if he pleaſe, on account of the difference from the terms; his conſent having been given to the purchaſe of one hundred *Kafeez*'s. If, however, the ground or the cloth ſhould prove *larger* than the deſcription, in this caſe the exceſs becomes the property of the *purchaſer*, and no option remains to the *ſeller*, becauſe (as has been already explained) the ſpecification of yards relates merely to *deſcription* and not to *ſubſtance*. The caſe, in ſhort, becomes the ſame as if he had ſold a *ſlave* on the ſuppoſition of his being defective, but who afterwards proves to be perfect.

but if it *exceed*, the ſale is binding to the amount agreed for.

If the quantity be ſo expreſſed as to relate both to

If a perſon ſell a piece of cloth, by declaring "I have ſold this "piece of cloth, which meaſures one hundred yards, at the rate of "one *dirm* for each yard," and a deficiency ſhould afterwards appear, in this caſe the purchaſer has the option, either of taking it, with a proportional deduction from the price, or of diſſolving the contract entirely; becauſe, although the ſpecification of yards comes under the head of *deſcription*, yet in this caſe the yards are conſidered as relating to the *ſubſtance*, the ſeller having oppoſed the price to *each* of them, which renders each (as it were) a *ſeparate piece of cloth*. Beſides, if the ſeller ſhould take the defective quantity at the rate propoſed for the *whole*, it would follow that the terms of the contract (namely the payment of *one dirm per yard*) did not take place:—if, on the other hand, the amount of the cloth exceed one hundred *yards*, the purchaſer has the option, either of taking the *whole*, at the rate of one *dirm* for each yard, or of diſſolving the bargain; for although he has an advantage in the receipt of more cloth than he had contracted for, yet this being tempered with a loſs, in the neceſſity it lays him under of paying an *additional ſum*, he is therefore left at liberty either to abide by the contract on theſe conditions, or to undo it.

ſtand to or undo the bargain, whether it *exceed* or *fall ſhort* of the amount ſpecified.

IF a perſon purchaſe ten yards of a houſe or bath meaſuring one hundred yards, ſuch purchaſe is invalid, according to *Haneefa*, whether the buyer may or may not have known the meaſurement of the whole houſe. The two diſciples maintain that it is valid. If, on the contrary, a perſon purchaſe ten *ſhares* of a houſe or bath containing one hundred *ſhares*, it is valid, in the opinion of all our doctors. The argument adduced by the two diſciples in ſupport of their opinion is, that ten yards of a houſe of an hundred yards in capacity are in fact the ſame as ten *ſhares* out of an hundred *ſhares*. *Haneefa*, in ſupport of his doctrine, argues that a *yard*, in its original meaning, is a ſtick applied to the purpoſe of meaſurement; but it is alſo uſed to denote the *thing meaſured*, and the thing ſo meaſured muſt be *relative* and not an *abſtract idea of the mind*, ſuch as a *ſhare*: now it is impoſſible, in this caſe, to render ſuch yards *relative*, ſince there exiſts an uncertainty, as no mention is made of the *particular ſide* of the houſe from which they have been meaſured; and ſuch uncertainty would occaſion contention between the parties. It is otherwiſe with reſpect to *ſhares*,

The ſale of a ſpecific number of *yards* of a *tenement* is null; but not the for theſe are abſtract ideas of the mind and not undefined relatives; and although, of conſequence, an uncertainty exiſt with reſpect to *them* alſo, yet ſuch uncertainty cannot occaſion a contention, ſince the poſſeſſor of ten *ſhares* of the houſe may either enjoy them indefinitely, or may receive his ſhare according to the mode preſcribed in the diviſion of joint property.

The purchaſe of a package of cloth is null, if it contain more or leſs than the quantity of pieces agreed for,

If a perſon purchaſe a package containing cloth, on condition of there being *ten pieces* in it, and it afterwards appear that there are nine or eleven pieces in it, the ſale is invalid, becauſe of the uncertainty, with regard to the *price*, in the one caſe, and to the *merchandiſe* in the *other*; for in caſe of there being *nine* pieces, as the price of the piece wanting is unknown, that of the remaining nine is of conſequence alſo unknown; and where, on the other hand, there is *one too many*, it is unknown which are the ſpecific ten that ought to be delivered. If, however, the ſeller ſhould explain the price of each piece of cloth, and there be *too few*, the ſale is valid; but the purchaſer has the option of undoing it if he pleaſe; whereas, if there be *too many*, it is invalid, becauſe of the uncertainty with reſpect to the goods, as it would be impoſſible to aſcertain the particular ten that are included in the ſale.—Some have ſaid that in caſe of *deficiency* alſo the ſale is invalid, according to *Haneefa*. But this is unfounded.

the price of each particular piece.

A ſale is null *in toto*, if the deſcription of

cious.

If a perſon ſell two pieces of cloth, on the condition of their being *Herâtee*, and one of them afterwards prove to be *Murwâllee**, in that caſe the ſale is completely invalid, that is, does not hold good even with reſpect to the *true* one, although the ſeller ſhould have ſpecified the prices of both; for when the ſeller joined together both pieces in the declaration of a ſale of *Herâtee* pieces, he, as it were, eſtabliſhed a condition that the purchaſer ſhould accept a piece of *Murwâllee*, which being a *falſe* condition the ſale is therefore annulled.

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* Of the manufacture of the provinces of *Herât* and

Caſe of the purchaſe of a piece of cloth

IF a perſon purchaſe a piece of cloth, on the condition of its meaſuring ten yards, and at the rate of one *dirm* for each yard, and the meaſurement afterwards prove to be ten yards and a half, or nine yards and a half, in this caſe the purchaſer (according to *Haneefa*) muſt pay ten *dirms* in the *firſt* inſtance, and nine in the *ſecond*; ſtill having the option of undoing the contract if he pleaſe. *Aboo Yooſaf* alleges that if the purchaſer chuſe to abide by the contract, he muſt pay eleven *dirms* in the *firſt* inſtance, and ten in the *ſecond*. The opinion of *Mohammed* is, that in caſe the purchaſer chuſes to abide by the contract, he muſt pay ten and a half *dirms* in the *firſt* inſtance, and nine and a half in the *ſecond*; becauſe the meaſurement of a yard having been fixed at *one dirm*, it neceſſarily follows that *half* a yard muſt be rated at *half a dirm*. The reaſoning of *Aboo Yooſaf* is that as the price of each yard was fixed at one *dirm*, it follows that each yard becomes virtually a diſtinct piece of cloth; and as one of theſe proves defective, it follows that the purchaſer has the option either of undoing the bargain, or of taking the goods according to the terms of the contract. The arguments adduced by *Haneefa* in ſupport of his opinion are, that the ſpecification of yards is conſidered as referring to the *deſcription*, and not the *real quantity* of the thing, excepting only where the price of each given meaſurement is ſpecifically ſtipulated ~~as~~ a condition of the contract. Now as, in the caſe in queſtion, the rate is oppoſed to *each complete yard*, but not to any *ſmaller* quantity, it follows that ſuch ſmaller quantity muſt be conſidered as remaining in its original form,—that is, as applying merely to *deſcription*, and therefore cannot involve an additional payment. Some have obſerved that in coarſe cotton cloths, of which the extreme and interior parts are of a ſimilar texture, it is not lawful for the purchaſer to take any exceſs beyond the terms of the contract; as it may be cut off and reſtored to the ſeller without any injury to the piece, in the manner of

things

things eſtimable by *weight*; and hence the learned deem it lawful to ſell even a *ſingle yard* of it.

In the ſale of a *houſe*, the foundation in-cluded.

If a perſon ſell the place of his abode (in other words, his *houſe*) foundation and ſuperſtructure are both included in ſuch ſale, al- they may not have been ſpecified by the ſeller; becauſe they are comprehended in the common acceptation of the term; and alſo, becauſe, being joined to the ground in the nature of *fixtures*, they are conſidered as dependant parts of it.

upon it are included:

trees upon it are included although they be not ſpecified, becauſe they are joined to it, in the ſame manner as foundation and ſuperſtructure in the preceding caſe.

but not the *corn:*

In a ſale of ground, the grain then growing on it is not included unleſs particularly ſpecified by the ſeller; becauſe it is joined to the ground, not as a *fixture*, but for the purpoſe of being cut away from it, in the ſame manner as goods of any kind which may have been placed upon it.

nor, in the ſale of a *tree*, is the *fruit* then upon it included:

but the purchaſer muſt immediately clear theſe away.

So alſo, if a perſon ſhould ſell a tree on which fruit is growing, the fruit belongs to the *ſeller*, unleſs it had been ſpecifically included in the ſale; becauſe the prophet has ſaid "*If a perſon ſell a* DATE *tree* "*with fruit upon it, the fruit belongs to the ſeller, unleſs the pur*"*chaſer ſhould have ſtipulated its delivery to him as a condition of* "*ſale.*" Beſides, although the fruit be, in fact, a part of the tree, yet as it is intended to be plucked and gathered, and not to be ſuffered to hang on the tree, it is therefore the ſame as grain. It is to be obſerved, however, that in the ſale of a tree with fruit, or of ground with grain upon it, the ſeller muſt be immediately deſired to clear them away, and deliver the property to the purchaſer; becauſe, in theſe caſes, the property of the purchaſer and ſeller being implicated together, it becomes incumbent on the ſeller to clear away what belongs to him; in the ſame manner as if he had placed any of his goods upon the ground, in which caſe the clearance of them would have been requiſite. *Shafei* maintains that in both theſe caſes the grain and the fruit muſt be ſuffered to remain until they become ripe, becauſe there ought to be a period ſtipulated for the delivery of the things ſold, and that period ought to be extended to the complete growth and maturity of theſe vegetables; in the ſame manner as in the caſe of a leaſe of ground, where if, at the expiration of the leaſe, the grain on the ground be *green*, it is ſuffered to remain until it ripen. Our doctors, on the other hand, argue that the obligation is the ſame on a *leſſee*; and if he be permitted to extend the leaſe on account of the unripeneſs of the grain, he muſt, however, pay additional rent for it, which is a ſubſtitute for the delivery; and the *ſubſtitute* is in effect the ſame as the *thing itſelf*. It is to be obſerved that in the ſale of a *tree*, the *fruit* is not included, whether it be of an appreciable nature or otherwiſe, unleſs it be ſpecifically mentioned.

In the ſale of *ground*, the *ſeed* ſown in it is not included.

IF a perſon ſell a piece of ground in which ſeed has been ſown, but of which the growth has not appeared above ground, in this caſe the ſeed is not included in the ſale. If the apparent growth ſhould have taken place, though not in ſuch a degree as to render the vegetable of any value, in this caſe there is a difference of opinion. Some allege that the vegetation is *not* included in the ſale; and others, that it *is*. This difference of opinion has its foundation in the different ſentiments which the parties entertain with regard to the validity of the ſale of vegetation, prior to its being fit to be cut down by the hook, or uſed by animals in the way of forage: for thoſe who conſider the ſeparate ſale of ſuch vegetation to be valid are of opinion that it is not included; whilſt thoſe who conſider the ſale of it as invalid are of opinion that it is included in the ſale of the ground.

The imme- product is not included, in the ſale of *land* or *trees*, although the *rights* and appendages be expreſſed in the con-

nor unleſs all its dependancies be *generally* expreſſed:

nor can any product be included after being *gathered*, or *cut*

Grain and *fruit* are not included in a ſale of ground, or of a tree, although the purchaſer and ſeller ſpecify the rights and appendages, (in other words, although the ſeller declare "I have ſold this "ground, or this tree, with all its rights and appendages,") becauſe grain and fruit do not fall under theſe deſcriptions. (The *rights* of a thing are thoſe without which it cannot be enjoyed, and which form the principal object of poſſeſſion, ſuch as a *water courſe* or a *road*:—the *appendages* are things from which we derive uſe, but which are more particularly conſidered as *dependant* parts, ſuch as a *cook-room*, or a houſe for *keeping water*.)—In the ſame manner, if the ſeller ſhould ſay "I "have ſold this tree, or this piece of ground, with every thing ſmall "and great of its rights and appendages which I poſſeſs in it," ſtill neither the fruit nor the grain is included in it.—If, however, he ſhould ſay in a *general* manner, "I have ſold this *tree*, (or this piece "of *ground*,) with every thing great and ſmall which I poſſeſs in it," in this caſe the grain and the fruit are neceſſarily included in it.—It is to be obſerved that grain which has been cut, or fruit which has been plucked, cannot by any conſtruction whatever be included in the ſale, unleſs expreſsly mentioned as ſuch.

Fruit may be ſold upon the tree in every of

but if the contract in- any condition not properly ap-

The ſale of fruit upon a tree is valid, whether the ſtrength of the fruit be aſcertained or not;—that is, whether it may or may not have reached ſuch a degree of ſtrength as may preſerve it from common accidents;—becauſe fruit is a property of certain value, either *immediately*, in caſe of its being *ripe*, or *hereafter*, in caſe of its being in an *unripe* ſtate:—(ſome have ſaid that the ſale of fruit in a *weak* ſtate is invalid: the firſt doctrine is, however, the moſt authentic:) and the ſale of fruit in an abſolute manner being valid, the purchaſer muſt immediately take it from the tree, whether this be particularly expreſſed as a condition in the ſale or otherwiſe. If, however, the condition of ſuffering the fruit to remain on the tree be ſtipulated, the ſale is null, becauſe ſuch a condition is illegal, ſince it implicates together the right of property of the two parties, which is repugnant to the nature of ſale; and every condition of this kind invalidates the ſale. Beſides, in this caſe it muſt neceſſarily follow that one deed is interwoven with another; in other words, that either a loan or a leaſe is implicated with the ſale, which is unlawful. In the ſame manner, the ſale of grain, with a ſtipulation of leaving it on the ſeller's ground, is unlawful, and for the ſame reaſon. The ſame rule alſo obtains (according to *Haneefa* and *Aboo Yooſaf*,) where the fruit or corn has attained its *full growth*, as this implicates the right of property of two parties. *Mohammed* is of opinion that, in this inſtance, ſuch a condition is lawful, becauſe of the exiſtence of the *whole* of the thing in queſtion; whereas, in the former caſe, the part of the property which afterwards vegetated was not in being at the time of the concluſion of the deed; and the ſtipulation of a condition with regard to a nonentity being illegal, the ſale is therefore null.

If a perſon purchaſe fruit upon the tree before it had reached its full growth, in an *abſolute* manner, (that is, without ſtipulating the condition of its remaining upon the tree until it become ripe,) and afterwards, with the permiſſion of the ſeller, ſuffer it to hang on the tree, in this caſe the additional growth becomes his lawful property. If, however, he act in this manner *without* the conſent of the ſeller; he muſt then beſtow the difference in charity, as being the produce of the property of another without the conſent of that other.—If, on the other hand, the ſale ſhould have taken place when the fruit had attained its full growth, and the purchaſer ſuffer it to remain until it become ripe, he is not on that account required to beſtow any thing in charity, becauſe in this inſtance a change from one ſtate to another takes place without any increaſe being made to the ſubſtance.

The additional [illegible] chaſed on th tree, if ſuffered to continue upon it, by conſent of the ſeller, is the property of the purchaſer;

If a perſon, having in an abſolute manner purchaſed fruit which had not attained its full growth, ſhould afterwards ſuffer it to remain on the tree till it became ripe, by taking a leaſe of the tree till that period,

and ſo alſo, i the purchaſe take a *leaſe* o the tree:

period, in this caſe the increaſe of ſubſtance is lawful to him, becauſe the leaſe is null, on account of a want of preciſe knowledge with reſpect to the period of it,—and alſo, on account of its not having been warranted by abſolute neceſſity, ſince it was in the power of the leſſee to have *purchaſed* the *tree itſelf*:—and the leaſe being null, there remains only the conſent of the ſeller, to which regard muſt be had. It is otherwiſe where a perſon purchaſes grain upon the ground, and having then taken a leaſe of the ground until the grain be capable of being cut down, ſuffers it to remain until that time; for the increaſe of ſubſtance is not in ſuch caſe lawful to him, ſince the leaſe ſo made is invalid, and an invalid leaſe is the occaſion of neſs and abomination.

with reſpect to grain purchaſed upon the ground.

Any *new* fruit which may grow in the
is the
perty
ſeller and *pur-*

If a perſon, in an unconditional manner, purchaſe fruit upon a tree which had not completely vegetated, and afterwards, before received a formal ſeizin of it, new fruit ſhould grow, in this ale is invalid, becauſe of the impracticability of delivery on the part of the ſeller, from the impoſſibility of diſtinguiſhing between what *was* the ſubject of the ſale and what was *not*. But if new fruit ſhould appear *after* the ſeizin of the purchaſer, ſuch fruit is in an equal degree the right of *both*, becauſe of its intermixture with the property of both. The aſſertion of the *purchaſer*, however, with regard to the quantity is credited, becauſe the fruit is in his poſſeſſion. (The ſale of artichokes or melons which are growing is ſubject to the ſame law as that of fruit growing upon trees.)

Rule in the purchaſe of vegetables.

If a perſon wiſh to purchaſe fruit, artichokes or melons, and afterwards to have it in his power to let them remain until they become ripe, or until they ſhall yield a new crop, ſo as to have a lawful claim to the property, the expedient to be practiſed, in order to render ſuch conduct legal, is to purchaſe the *tree* or *bed itſelf*, and after clearing it of the fruit when ripe, to undo the contract of ſale with regard to the tree or bed*.

be ſold on the tree, with a any *part*.

IF a perſon ſhould ſell fruit, with a reſervation of a ſpecific number of *Ratls* of it, the ſale is invalid, whether the fruit be upon the tree or off it; becauſe although the reſervation be itſelf ſpecific and known, yet the reſidue is *un*known. It is otherwiſe where a reſervation is made of a ſpecific *tree*; becauſe there the remainder is known, being obvious to the eye.—Our author remarks that this doctrine is conformable to a tradition of *Haſan*, adopted by *Tahávee:* but that ſuch a ſale is valid, according to the *Zahir Rawáyet*, and alſo in the opinion of *Shafeï*, becauſe it is a rule that whatever may be lawfully ſold, ſeparately, may alſo be lawfully excepted from a deed of ſale. Thus the ſale of one *Kafeez* from a heap of grain being lawful, the *exception* of it is alſo a lawful act.—It is otherwiſe with reſpect to a *fœtus* in the womb, or any particular member of an animal; becauſe as the ſeparate ſale of ſuch ſubjects is illegal, ſo alſo is the reſervation of them.

THE ſale of wheat in the ear, or of beans in the huſk, is valid; and the law is the ſame with reſpect to rice or rape ſeed in the huſk. *Shafeï* is of opinion that the ſale of green beans in the huſk, or of walnuts, almonds, or Piſtachio nuts in the ſhell, is not valid; but with reſpect to wheat in the ear, he has given two oppoſite opinions. All theſe ſales are, however, valid in the opinion of all *our* doctors. The reaſoning of *Shafeï* is that the ſubject of the ſale, in theſe caſes, is hidden within a thing of no value in itſelf, namely the *huſk*, and that therefore the caſe becomes the ſame as if a goldſmith ſhould ſell a heap of earth mixed with particles of gold, in exchange for another

in the huſk.

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* The conſent of the ſeller is here preſuppoſed; for neither of the parties can undo a ſale without the conſent of the other. This expedient is therefore ſuggeſted on a ſuppoſition of the future undoing of the ſale being equally agreeable to both parties.

ſimilar nature, which is invalid. The arguments of our doctors upon this point are twofold. First, the prophet has ſaid "The ſale of *fruit upon the tree, or of grain in the ear, is invalid, unleſs it approach to a ſtate of ripeneſs*[*]. Secondly, wheat is an article capable of yielding advantage; and hence the ſale of it in the ear is valid in the ſame manner as that of *barley*, the one being an appreciable article as well as the other. It is otherwiſe with gold duſt, for the ſale of that, mixed with earth, is unlawful from the poſſibility of its being uſurious.

ſale of a houſe includes the fixtures and their appen-

If a perſon ſell a houſe of which the locks are not of the *hanging* but of the *fixed* kind, in this caſe, the keys of ſuch locks are conſidered as included in the ſale; becauſe the locks themſelves are included in the houſe, in conſequence of their being *fixtures*; and the ſale of a lock includes the key, without its being expreſsly ſtipulated, becauſe it is conſidered as a conſtituent part of it, ſince a lock without a key is of no

The *ſeller* muſt defray expence

money-eſſayers:

The wages of the meaſurer[†] of the goods, or of the eſſayer of the money, muſt be paid by the ſeller:—the wages of the *meaſurer*, becauſe, as meaſurement is eſſential to enable the ſeller to deliver over the goods, the payment of the expence attending that falls properly upon *him*; (and ſo alſo, the wages of *weighers* or *tellers*:)—and the wages of the *eſſayer*, becauſe of a tradition, delivered by *Ibn Rooſtim*, that ſuch is the doctrine of *Mohammed*; and alſo for this reaſon that the eſſay of the money takes place after the delivery, when it becomes the buſineſs of the *ſeller* to have it eſſayed, in order that he may diſtinguiſh what is his right and what is not; and that he may aſcertain the bad coin in order to reject them. *Ibn Soomâï* relates it as the opinion of *Mohammed* that the *purchaſer* ſhould defray the wages of the eſſayer, becauſe he ſtands in need of aſcertaining the good *dirms* which he has ſtipulated to deliver, and the *good dirms* are known by means of an *eſſayer*, in the ſame manner as *quantity*, by means of a *meaſurer*.

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[*] Whence it may be inferred that the ſale, in the *ear*, or upon the *tree*, is admiſſible.

[†] Meaning, properly, ſome perſon who is employed as a *ſworn* or *profeſſed* meaſurer.

THE charge of weighing the price is due by the *purchaſer*, becauſe he is under the neceſſity of delivering it to the ſeller, and the delivery is completed after the aſcertainment of the weight. In a ſale ſtipulating immediate payment, the purchaſer muſt firſt deliver the price to the ſeller, becauſe his right (namely the goods ſold) is of a fixed and determinate nature, whereas the *price* is not ſo; and it is therefore incumbent on him, in order that both parties may be on a par, to deliver the price to the ſeller, which fixes and determines it; for it cannot be determined but by delivery*.

but the charge of weighing, the price muſt be defrayed by the *pur-*

IN a ſale of goods for goods, or of money for money, it is neceſſary that both parties make the delivery at the ſame time; becauſe being on a par in point of certainty and uncertainty, there is no neceſſity for a *prior* delivery.

In barter or exchange the

made by both parties at the ſame time.

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* Thus if the price ſtipulated be *ten dirms*, and the purchaſer be in poſſeſſion of a *thouſand dirms* (for example) in this caſe, although the number ten be *determinate*, yet the units to compoſe that number and to be taken from a great number, are not ſpecific and determinate, until actually delivered. This doctrine is frequently and particularly enlarged upon in the ſequel of this book.

CHAP. II.

Of Optional Conditions *.

Definition of the term.

An optional condition is where one of the parties ſtipulates it as a condition that he may have the option, for a period of two or three days, of annulling the contract if he pleaſe.

A condition by either party,

The ſtipulation of a condition of option, on the part either of the ſeller or purchaſer, is lawful; and it may be ſtipulated to continue for three days or leſs; but it muſt not be extended *beyond* that term; becauſe it is related that *Hoobán* having been defrauded in ſeveral of his bargains, the prophet addreſſed him thus, "Hooban, *when you make* "*a purchaſe bar deceit, and ſtipulate a condition of option.*"

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* Arab. *Khiár-al-Shirt.* In contracts of ſale there are five different options. Theſe are, 1ſt. Option of acceptance. 2. Optional conditions. 3. Option of determination. 4. Option of inſpection: and, 5. Option from defect. An *option of acceptance* is a liberty which either of the parties, in a contract of ſale, has of withholding his acceptance, after the tender of the other, until the breaking up of the meeting. An *optional condition* is where one of the parties ſtipulates a period of three days before he gives his final aſſent to the contract. An *option of determination* is where a perſon, having purchaſed one out of two or three homogenous things, ſtipulates a period to enable him to fix his choice. *Option of inſpection*, is the power which the purchaſer of an unſeen thing has of rejecting it after ſight. *Option from defect* is the power which a purchaſer has of diſſolving the contract on the diſcovery of a defect on the merchandiſe.—The tranſlator has thought it proper, in this note, to bring into one point of view an explanation of the ſeveral kinds of option, as it may poſſibly tend to give a clearer idea of them than what could be collected from the ſcattered definitions of them as they occur in the courſe of the work.

the term of *three days.*

AN optional condition, ſtipulated to remain in force for a period exceeding three days, is unlawful according to *Haneefa*; and *Ziffer* and *Shafeï* are of the ſame opinion. The two diſciples, on the contrary, maintain that it may be ſtipulated to continue to any length of time whatever; becauſe it is related that *Ibn Omar* extended it to *two months*; and alſo becauſe it is ordained, by the LAW, for the purpoſe of anſwering the neceſſities of man, in enabling him to conſider and ſet aſide what is bad; and as a period of three days may not be ſufficient for this purpoſe, the indulgence is therefore extended with reſpect to the *merchandiſe*, in the ſame manner as with reſpect to the *price*. The argument of *Haneefa* is that an optional condition is repugnant to the nature of the act, which fixes an immediate obligation on the parties, and is allowed only becauſe of the ſaying of the prophet already quoted; whence it cannot be extended to a period beyond what has been there ſpecified.

If it *exceed* three days, and the ſtipulating party declare his acceptance before the expiration of the

ALTHOUGH a conditional option beyond three days be not permitted, ſtill if ſuch a condition be ſtipulated, and the perſon making ſuch ſtipulation, before the lapſe of the three days, declare his acceptance of the contract, the ſale is in that caſe valid, according to *Haneefa*. , however, is of a different opinion; for he argues that the ſale being invalid from the beginning, on account of the illegality of the condition, it cannot be afterwards rendered valid by the removal of ſuch condition. The arguments of *Haneefa* on this point are twofold. FIRST, as the acceptance of the ſale was declared before the lapſe of the three days, the cauſe of its invalidity has not began to operate. SECONDLY, the invalidity takes place on the *fourth* day; and as the acceptance is declared before that period, the ſale is conſequently kept free from any cauſe of invalidity. From this ſecond argument ſome have conſidered that the invalidity of the ſale does not take place until the commencement of the fourth day;—whilſt others, (founding their opinion on the *firſt* argument,) hold that the contract

was

invalid from the beginning; but is afterwards rendered valid by the removal of the cauſe of its invalidity *previous to its operation.*

The *payment of the price* may be ſubſtituted as the condition.

It is lawful for a perſon to make a purchaſe on this condition, that " if, in the courſe of three days, he do not pay the price, the ſale " ſhall be null and void." If, however, inſtead of *three* days he ſtipulate *four*, the ſale is not valid, according to *Haneefa* and *Aboo Yooſûf.* *Mohammed* is of opinion that it is valid, whether he ſtipulate four days or more. All our doctors however agree, that in caſe of ſuch a ſtipulation having been made, if the purchaſer, in the mean time, pay the price, previous to the lapſe of the third day, the ſale is valid. The reaſon of this is that a condition of this nature is of the ſame nature with an *optional condition*, becauſe, in caſe the purchaſer cannot furniſh the price, the *ſeller* ſtands in need of a power to annul the act. As, moreover, *Haneefa* holds that a ſale is invalid, where the condition of option extends beyond three days, but may afterwards be rendered valid by a formal confirmation previous to the lapſe of the third day, ſo alſo in the caſe in queſtion. As *Mohammed*, on the contrary, holds that the extenſion of the condition of option *beyond* the third day is lawful, ſo alſo in the preſent inſtance. *Aboo Yooſaf*, on the other hand, although (contrary to analogy) he hold the extending of a *condition of option* beyond three days to be lawful, becauſe of a tradition which he quotes to this effect, yet is of opinion that the ſame extenſion is unlawful in the preſent inſtance, (arguing from analogy,) as there is no tradition in ſupport of it. There is another explanation, from analogy, with reſpect to this caſe, which has been adopted by *Ziffer*, to the following effect, that, in the ſale in queſtion, an *invalid* diſſolution has been ſtipulated, (for the diſſolution is invalid, as it depends upon a condition;) and as a ſale is rendered void by the ſtipulation of a *valid* diſſolution, it follows that by the ſtipulation of an *invalid* diſſolution it is rendered void *a fortiori.* The reaſon, however, for a more liberal conſtruction in this particular is, that the condition here ſtipulated is conſidered as an equivalent to a condition of *option*, as has already been explained.

IF the *ſeller* ſtipulate a condition of option, the right of property over the goods does not in that caſe ſhift from *him*, becauſe the completion of the ſale depends on the mutual conſent of the parties, and the condition of option evinces that the ſeller has not completely conſented. If, therefore, under theſe circumſtances, the ſeller ſhould emancipate a ſlave whom he had in that manner ſold, the emancipation would hold good.—Neither is the purchaſer in ſuch a caſe entitled to uſe or employ the goods, although he ſhould have taken poſſeſſion of them with conſent of the ſeller.—If, after the purchaſer had poſſeſſed himſelf of the goods, they ſhould periſh or be deſtroyed previous to the expiration of the period of optional condition, he becomes in that caſe reſponſible for the value; becauſe by the deſtruction of the goods the ſale is annulled; (for the execution of it reſted only on the conſent of the *ſeller*; and where the ſubject of it is loſt, the execution of it becomes impracticable; and it is null of courſe;) and as the goods were in poſſeſſion of the purchaſer with a view to purchaſe, (which circumſtance renders a purchaſer reſponſible for the value,) he is reſponſible accordingly. If, on the other hand, the goods be loſt in the poſſeſſion of the ſeller, the deed is annulled; and no payment is incumbent on the purchaſer, in the ſame manner as in the caſe of an abſolute ſale, that is, a ſale where no condition is ſtipulated.

The *ſeller*, by ſtipulating a condition of option, does not relinquiſh his property in the article ſold:

IF the condition of option be ſtipulated by the *purchaſer*, the right of property over the goods ſhifts from the ſeller, becauſe the ſale is rendered complete on his part. The right of property, however, although it ſhift from the ſeller, does not veſt in the purchaſer, according to *Haneefa*. The two diſciples have ſaid that the purchaſer becomes the proprietor; for, if this were not the caſe, it muſt neceſſarily follow that, after it moved from the ſeller, it would remain ſubject

but the property in it devolves upon the purchaſer where the ſtipulation is made on *his* part; and he is conſethe loſs of the goods.

ſubject to *no* perſon; and this is a ſtate not ſuppoſed by the LAW. The arguments of *Haneefa* on this point are twofold. FIRST, as the right of property with reſpect to the price has not ſhifted from the purchaſer, it follows that if the right of property with reſpect to the goods alſo veſt in him, the property with reſpect both to the thing *purchaſed*, and the *return* for it is concentered in one perſon, which is abſolutely illegal. SECONDLY, If the right of property with reſpect to the goods were to veſt in the *purchaſer*, it might frequently happen that the goods would, in the interval, before the completion of the ſale, be made away, without any intention on the part of the purchaſer; (as if the purchaſer had bought a ſlave related to himſelf within the prohibited degrees*;) and as the ſole object of the reſerve of option is the *benefit of the purchaſer*, in allowing him time for conſideration, it follows, that if the right of property were to veſt immediately in him, he might be deprived of the advantage which is the object of the reſerve of option.

If the purchaſer have the option, and the goods be injured or deſtroyed in the interim, he is reſponſible for the *price*:

IF the merchandiſe, where the ſtipulation of option is on the part of the *purchaſer*, periſh or be deſtroyed, the purchaſer is in that caſe anſwerable for the price. In the ſame manner alſo, if the goods receive an *injury*, the purchaſer is reſponſible for the price; becauſe the goods, after ſuſtaining an injury, cannot be returned, and the ſale conſequently becomes binding. The purchaſer, therefore, is reſponſible for the price in either inſtance; for *deſtruction* neceſſarily implies previous *injury*; and hence in a caſe where the purchaſe is utterly *deſtroyed*, the ſale *firſt* becomes binding and complete, and the deſtruction takes place *afterwards*; and as, in a caſe of injury, the payment of the price becomes obligatory, ſo alſo in a caſe of deſtruction. It is otherwiſe where the merchandiſe periſhes in the poſſeſſion of the *purchaſer* when the option had been ſtipulated by the *ſeller*; for in

but if it reſt with the *ſeller*, the purchaſer is reſponſible for the *value* this caſe the purchaſer is anſwerable only for the *value*[*]; becauſe the circumſtance of the injury does not render the reſtitution impracticable, ſince the ſeller, in that caſe, has the option either of taking the merchandiſe thus injured, or of rejecting it, if he pleaſe, as the optional condition remains with him: and hence, as the ſale does not become binding on the occurrence of the injury, if the ſeller chuſe to confirm it, the purchaſer in that caſe only pays the *value* of the injured merchandiſe.

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* In which caſe the ſlave would become immediately free. See Vol. I. p. 432.

Right of option, in the purchaſe of a wife, is not affected by cohabitation with her in the interim of option.

IF a perſon purchaſe his own wife, with a reſerve of option for three days, in this caſe the marriage ſubſiſts during that interval, as the right of property does not take place becauſe of the *optional condition:* and if he have carnal connexion with her during that interval, the condition of option is not thereby annulled; becauſe he has it ſtill in his power, after ſuch connexion, to undo the ſale, ſince his cohabitation with her is the exerciſe of a right in virtue of his *marriage*, and not of his *right of property*.—If, however, his wife be a *virgin*, his cohabitation with her annuls the condition of option, and eſtabliſhes the ſale, as it is a damage to her, and a diminution of her value.—This is the doctrine of *Haneefa*. The two diſciples are of opinion that the huſband becomes immediate proprietor of his wife by the optional purchaſe, whence the marriage is immediately annulled. If, therefore, he ſhould have cohabitation with her, he cannot afterwards reject her, although ſhe may have been a *woman*[†]; becauſe, the marriage being null, the cohabitation was not in virtue of *marriage*, but of *property*.—This difference of opinion between *Haneefa* and the two diſciples, reſpecting the property veſting immediately in a conditional purchaſer, has given riſe to oppoſite deciſions in a variety of different caſes. Of this number are the following.

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[*] And *not* for the *price* ſet upon it in the *contract*.

[†] That is to ſay, not a *virgin*.

Caſe of optional purchaſe of a ſlave related to the purchaſer;

and of a ſlave optionally purchaſed under a vow of *emancipation*;

or of a menſtruous *female* ſlave;

or of a *pregnant wife*.

If a perſon make an optional purchaſe of a ſlave related to him within the prohibited degrees, the emancipation, in the opinion of the two diſciples, takes place immediately; whereas, according to *Haneefa*, it does not take place until after the confirmation of the contract.—If, alſo, a perſon make a vow to emancipate a ſlave whenever he becomes proprietor of one, then, according to the two diſciples, if he make a conditional *purchaſe* of one, the emancipation takes place immediately; whereas, according to *Haneefa*, it does not take place till after the confirmation. If, alſo, a perſon make an optional purchaſe of a female ſlave, and her monthly courſes happen during the term of option, theſe courſes are included in the preſcribed term of abſtinence[*], according to the two diſciples; whereas, according to *Haneefa*, they are *not* included. And if the purchaſer, availing himſelf of his optional condition, ſhould return her to the ſeller, the ſeller need not obſerve the preſcribed term of abſtinence, according to *Haneefa*; whereas, the two diſciples hold that ſuch obſervance is incumbent on him.—If, on the other hand, a perſon make an optional purchaſe of his own wife, and if ſhe, during the interval of option, bring forth a child, ſhe is not an *Am-Walid* to the purchaſer, according to *Haneefa*; whereas, according to the two diſciples, ſhe is ſo.—If, alſo, a perſon make an optional purchaſe of merchandiſe, and having, with the conſent of the ſeller, received poſſeſſion of it, afterwards give it in depoſit to the ſeller, and it be loſt in the interval, in this caſe, according to *Haneefa*, the truſt is null and void, as the depoſit was not the property of the purchaſer, and therefore he is of opinion that the loſs reſults to the ſeller; whereas the two diſciples, holding the ſaid depoſit to be valid, are of opinion that the loſs reſults to the *purchaſer*, agreeably to the law of depoſits.—If, on the other

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[*] The purchaſer of a female ſlave is required to abſtain from carnal connexion with her until ſhe ſhall have had three different courſes from the period of her becoming his property, that it may be aſcertained whether ſhe be pregnant or not. (See *Edit.*)

Optional purchaſe made by a

hand, a privileged ſlave make an optional purchaſe, and the ſeller, during the interval of option, exempt him from the payment, in this caſe, according to *Haneefa*, the condition of option remains in force; becauſe if he ſhould return the merchandiſe, it follows that he does not chuſe to accept of the property, and a privileged ſlave has the power of accepting or rejecting as he pleaſes:—but, according to the two diſciples, the condition of option is annulled by the exemption of payment; becauſe (in their opinion) the property having veſted from the beginning, it follows that if he were to return the merchandiſe to the ſeller it would be in effect a *gift* to him, and a privileged ſlave has not the power of making a gift.—If, moreover, a *Zimmee* purchaſe ſpirituous liquors from a *Zimmee*, on a condition of option, and the purchaſer, in the interval, become a *Muſſulman*, in this caſe, according to the two diſciples, the condition of option remains no longer in force, becauſe the purchaſer having (agreeably to their tenets) become proprietor of the liquor, it follows that if he were permitted to reject it, he would create in another a right of property with reſpect to liquors which no *Muſſulman* is allowed to uſe.—According to *Haneefa*, on the contrary, the ſale becomes void, becauſe the purchaſer, (agreeably to his tenets,) not being then the proprietor, and the circumſtance of becoming a *Muſſulman* putting it out of his power to become the proprietor by removing the condition, the ſale is of neceſſity annulled.

chaſe of *wine* by a Z who in

The poſſeſſor

the party, or *confirm* it

In caſe of a ſale on a condition of option, it is lawful, according to *Haneefa* and *Mohammed*, for the party poſſeſſing the option to annul the contract within the ſtipulated period, or to confirm it; which latter he may do without the knowledge of the other party: but it is not lawful for him to *annul* it without the knowledge of the other.—*Aboo Yooſaf* alleges that the party poſſeſſing the option may annul the contract without the knowledge of the other; and ſuch, alſo, is the opinion of *Shafeï*.—The argument of *Aboo Yooſaf* is that the party poſſeſſing the option is empowered, on the part of the other, to annul the contract; and that, therefore, ſuch annulment cannot reſt upon that other's knowledge of it; in the ſame manner as his knowledge of it is unneceſſary in caſe the poſſeſſor of the option *confirm* the contract; as in the caſe of an agent for *ſale*, (for inſtance,) who may lawfully act in every matter to which his agency extends, without the knowledge of his conſtituent, in virtue of the powers given to him on his behalf.—The arguments of *Haneefa* and *Mohammed* are, that a contract of ſale involves the rights of both parties; and that the annulment of the ſale by *one* party only is an exerciſe of a right partly belonging to the *other*, whilſt at the ſame time ſuch exerciſe may eventually be attended with a *loſs* to the other: for ſuppoſing the poſſeſſor of the option to be the *ſeller*, and that he annul the ſale without the knowledge of the purchaſer, and the purchaſer, in the mean time, in the confidence of the ſale being complete, take poſſeſſion of the merchandiſe, then, in caſe of its deſtruction, he muſt of conſequence be reſponſible for it:—or, ſuppoſing the *purchaſer* to be the poſſeſſor of the option, and that he annul the ſale without the knowledge of the ſeller, then an eventual loſs may reſult to the *ſeller*, as it is poſſible that, on the preſumption of his goods being already ſold, he may enquire out another purchaſer. Hence, as ſuch an exerciſe, on the part of either, of the right of the other, may be attended with an eventual injury, the annulment of an optional ſale is therefore made to reſt upon the knowledge of the other party.—This caſe, in ſhort, reſembles the diſmiſſion of an agent: for if a perſon, having appointed an agent, ſhould afterwards diſmiſs him without his knowledge, it would not be valid until the agent was himſelf informed of it; and ſo alſo in the caſe in queſtion.—It is otherwiſe with the *confirmation* of a ſale; as the exerciſe of ſuch a right by one party only does not entail an injury.—The aſſertion of *Aboo Yooſaf* that "the poſſeſſor of the option is empowered to make "ſuch annulment on the part of the other," is not admitted; for how can the other, who does not himſelf poſſeſs ſuch power, beſtow it upon the poſſeſſor of the option?

If the perſon poſſeſſing the option annul the ſale without informing the other party, and ſuch knowledge, nevertheleſs, reach him before the expiration of the ſtipulated period, then, becauſe of his acquirement of ſuch knowledge, the annulment is rendered complete. If, on the other hand, it ſhould not have reached him until the expiration of the ſtipulated period, then the annulment is rendered complete, becauſe of the expiration of the ſtipulated period.

without the other's knowledge, and the other before the expiration of the term, it is valid.

If a perſon poſſeſſing the right of option in a ſale ſhould die, the ſale is then complete, and the right of option becomes void, and does not deſcend to his heirs.—*Shafeï* maintains that the option deſcends to the heirs, becauſe, being a fixed and eſtabliſhed right in ſale, it may be inherited, in the ſame manner as an option in caſe of defect, or an option of determination. The arguments of our doctors are that an option is in reality nothing but *deſire*, or *diſpoſition*, which is not capable of being transferred from one to another; and nothing but what is capable of devolving from one perſon to another can be inherited.—It is otherwiſe with reſpect to option in caſe of *defect*, as that is granted to the heir, becauſe of his right to obtain poſſeſſion of a thing whole and complete, in the ſame manner as the deceaſed, and not becauſe of his right of *inheritance*, ſince option is incapable of being a ſubject of inheritance. It is otherwiſe, alſo, with reſpect to an option of *determination*, as the heir becomes the proprietor in that inſtance, becauſe of the *mixture of property*, and not becauſe of his *right of inheritance*.

A right of option, in ſale, cannot deſcend to an *heir*.

If a perſon, in purchaſing any article, ſtipulate the option of another perſon, in this caſe, provided either the purchaſer or the poſſeſſor of the option confirm the ſale, it is valid; or, if either of them annul it, it becomes void.—The reaſon of this is, that the ſtipulation of the option of another is admitted, upon a *favourable conſtruction*.—*Analogy* would ſuggeſt that it is inadmiſſible, and ſuch is the opinion of *Ziffer*, becauſe option being one of the articles of the contract, it follows

A right of optio be ref to a third perſon.

follows that the ſtipulation of it for *another*, who is not one of the contracting parties, is illegal, in the ſame manner as if it were ſtipulated that ſome other than the purchaſer ſhould pay the price.—The arguments of our doctors are, that the eſtabliſhment of the right of option, in one who is not a party to the contract, is by way of appointment from him to act as his ſubſtitute.—In this caſe, therefore, the option is veſted both in the party and in his ſubſtitute; and conſequently it is lawful for either of them to confirm or annul the contract.—If one of them ſhould confirm, and the other annul the contract, in this caſe the *firſt* of theſe acts which may have been performed becomes valid. If both ſhould have been performed at the ſame time, then (according to one tradition) the act of the *contracting party* is valid;—or (according to another) the validity of the *annulment* is preferred to that of the *confirmation.* The principle on which the firſt tradition proceeds is that the act of the contracting party is of ſuperior force to that of a ſubſtitute who derives his authority from him; and the principle on which the ſecond tradition is founded is that annulment is of ſuperior force to confirmation, becauſe annulment may take place after confirmation, but confirmation cannot take place after annulment. Some have aſſerted that the firſt tradition is conformable to the doctrine of *Mohammed*, and the ſecond to that of *Aboo Yooſaf*;—arguing from their different deciſions in the caſe of an agent of ſale and his conſtituent: for if both of them ſhould at the ſame time ſell the ſame thing to different perſons, the ſale of the conſtituent is valid, according to *Mohammed*;—whereas, according to *Aboo Yooſaf*, both ſales are valid; but the article ſold muſt be divided between the two purchaſers.

Caſe of ſelling two ſlaves, with a condition of option with reſpect to *one* of them.

If a perſon ſell two ſlaves for a thouſand *dirms*, ſtipulating an optional condition with reſpect to one of them, the caſe admits of four different ſtatements.—I. Where the ſeller does not oppoſe a ſpecific price to *each* of the ſlaves, nor ſpecify the one reſpecting whom the optional condition is to operate; and this is illegal, becauſe of the both as to the ſubject of the ſale and the price; for as the ſlave, concerning whom the condition of option is ſtipulated, is not (as it were) *included in the ſale*, and as he is not ſpecified, it follows that the other, who is the ſubject of the ſale, is alſo unknown.—II. Where the ſeller ſets a particular price upon each of the ſlaves, and alſo ſpecifies to which the condition of option relates; and this is valid, becauſe of the certainty with reſpect to the *ſubject* of the ſale and the *price*.

Objection.—It would appear that the ſale is in this caſe illegal; becauſe the ſlave who is the ſubject of the condition is not, in effect, included in the ſale; and as both are joined together in one declaration, it follows that the acceptance of the ſale with relation to what is *not* the ſubject of it, becomes a condition of the validity of the ſale with regard to what *is*; it being the ſame, in ſhort, as if a perſon ſhould join a freeman and a ſlave in one declaration of ſale, which is illegal, becauſe the acceptance of the ſale with regard to what is not capable of being the ſubject of it (namely, the *freeman*) is here made a condition of the validity of the ſale with reſpect to the *ſlave*; and this condition is the cauſe of annulling the ſale: it therefore follows that the ſale is in the ſame manner invalid in the caſe in queſtion, as the ſame condition (which occaſions an annulment of the ſale) is equally induced in this inſtance.

Reply.—The ſale, in the caſe in queſtion, is lawful; becauſe, although the acceptance of the ſale, with reſpect to the ſlave concerning whom the option is ſtipulated, be a condition of the validity of the ſale with reſpect to the other ſlave alſo, ſtill ſuch condition does not annul the ſale, ſince the optional ſlave is a fit ſubject for ſale: it is therefore, in fact, the ſame as if a perſon were to join a *Modabbir* and an *abſolute* ſlave in one declaration; and as the ſale is in that inſtance valid, ſo alſo in the caſe in queſtion:—contrary to where a ſeller joins a ſlave and a *freeman* in one declaration; becauſe a *freeman* is not a fit ſubject of ſale.

—III. Where the ſeller oppoſes a particular price to each ſlave, but does not ſpecify to which of them the condition of option relates.—IV. Where the ſeller ſpecifies the ſlave to whom the condition of option relates, but does not oppoſe a ſpecific price to each of them.—In both theſe caſes the ſale is invalid, becauſe of the uncertainty of the *ſubject* of the ſale in the *one* inſtance, and of the *price* in

Option of *determination.*

If a perſon purchaſe one of two pieces of cloth for ten *dirms*, on the condition of his being at liberty for three days to determine on the particular piece which he may approve, ſuch ſale is valid; and the condition ſo ſtipulated is called an *option of determination* *.—A ſale is in the ſame manner valid, where a perſon purchaſes, with a reſerve of option, one out of *three* pieces; but it is not lawful to purchaſe in that manner one out of *four* pieces.—What is here advanced proceeds upon a favourable conſtruction.—*Analogy* would ſuggeſt that the ſale is not lawful in either of theſe three caſes; becauſe the ſubject of ſale is uncertain;—and ſuch, alſo, is the opinion of *Ziffer* and *Shafeï.*—The reaſon for a more favourable conſtruction is, that optional conditions have been ordained for the benefit of man, in order that he may thereby be enabled to ſet aſide the bad, and to chuſe the good for himſelf:—it is, moreover, evident that man ſtands in need of contracts of this nature, in order that he may be enabled to ſhew the merchandiſe to ſome perſon in whoſe judgment he confides; or, if an agent be employed, that he may ſhew it to his conſtituent; and this the ſeller would not permit him to do unleſs ſuch a condition were ſtipulated.—This ſpecies of ſale, therefore, being in effect the ſame as an *optional* one, it follows that it is in a ſimilar manner lawful.—This neceſſity on the part of man, however, is fully anſwered by means of *three* pieces, as this number comprehends the three qualities

of *three*, but not out of

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* Arab. *Khiâr-al-tayeen.*

bad,

and *medium*; and there can be no uncertainty with reſpect to the ſubject of the ſale, in this ſpecies of contract, to occaſion contention, as regard is had ſolely to the price on which the purchaſer determines.

OBJECTION.—Why then is it not lawful with reſpect to *four* pieces, as in that caſe alſo no contention would take place?

REPLY.—Although, in this caſe alſo, there would be no uncertainty with regard to the ſubject of the ſale, to occaſion contention, ſtill the efficient cauſe of the legality (namely, the neceſſity of MAN) does not here exiſt; and it is therefore unlawful.

An option of *determination* may involve a condition of *option*:

but the term for making

events, exceed *three days*.

SOME have obſerved that, in a caſe of *option of determination*, a condition of option is alſo indiſpenſable; and this is recorded in the *Jama Sagheer*. Others again, (following the *Jama Kabeer*,) ſay that the condition of *option* is not requiſite; and hence it is inferred that what has been recorded in the *Jama Sagheer* is that ſuch a condition *often takes place*; not that it is *abſolutely neceſſary*. It is to be obſerved, however, that if, in a ſale ſtipulating an option of determination, it ſhould not be thought neceſſary to inſert a condition of option, the period for determining the choice muſt in that caſe, according to *Haneefa*, be limited to three days: but according to the two diſciples it may be fixed to whatever period they pleaſe. It is alſo to be obſerved that in a caſe of *option of determination*, the ſubject of the ſale is one piece of cloth (for example), and the other piece is a depoſit in the hands of the purchaſer*. If, therefore, one of the pieces be loſt or ſpoiled, the ſale takes place with reſpect to it in exchange for the ſtipulated price; and the other price is as a *depoſit*; becauſe it is impoſſible to reject the piece which is loſt or ſpoiled. If, on the other hand, *both* pieces be loſt at the ſame time, the purchaſer muſt in that caſe pay the half of the price of each, becauſe the determination of

Of the articles referred to the purchaſer's choice, one is

as

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* And conſequently (according to the laws of *depoſit*) he is reſponſible in caſe of accidents, for *one piece only*.

purchaſe not having been made with reſpect to either of the pieces, it follows that ſale and truſt operate indefinitely with reſpect to each.

and both may be returned in caſe of a condition of *option.*

If, beſides the option of determination, a conditional option be alſo ſtipulated, the purchaſer is in that caſe at liberty to return both pieces.

The heir of the perſon endowed with an option of determination may return one of the two articles refered to the purchaſer's option, in caſe of his death.

If a perſon poſſeſſing an option of determination ſhould die, his heir is empowered to return one of the articles; for an option of determination (as has been before explained) neceſſarily deſcends to an heir, becauſe of the implication of his property with that of another; whence he is not, in his option of determination, reſtricted to *three* days.—If, on the contrary, a perſon recently poſſeſſed of a power of *option* die, his heir has no option, as was before explained*.

Option is declared and the ſale made binding, by any act of the purchaſer in relation to the article ſold.

If a perſon purchaſe a houſe under a condition of option, and the adjoining houſe be afterwards ſold before the expiration of the period of option, and the purchaſer under the condition of option claim the right of *Shaffa*, in this caſe his aſſent to the firſt ſale is thereby virtually given, and his right of option exiſts no longer;—becauſe his claim of *Shaffa* preſuppoſes him to be confirmed in the adjoining property, otherwiſe he would have no right to make ſuch a claim; and it is therefore inferred, that he firſt tacitly annuls his condition of option, and then urges his claim. It is to be obſerved that the neceſſity of this explanation ariſes from the doctrine of *Haneefa*; for, by his tenets, a purchaſer under a condition of option does not become proprietor of the article of ſale during the interim of option. The two diſciples hold, on the contrary, that he becomes immediate proprietor under the condition of option; whence this explanation is, with regard to *their* doctrine, unneceſſary.

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* Becauſe a condition of option is not inheritable. (See p. 389.)

An option o determina-tion, veſted jointly in tw perſons, is determined by the ſubſequent conſent of eithe to the pur-chaſe.

If two perſons purchaſe a ſlave, on this condition, that both purchaſers ſhall have the option of rejecting him, and one of them afterwards expreſs his conſent, the other cannot reject him, according to *Haneefa*. The two diſciples allege that if the other chuſe, he may reject *his ſhare* in the ſlave. The ſame diſagreement ſubſiſts with reſpect to two purchaſers in a caſe of *option of inſpection* or *option from defect*. The argument of the two diſciples is that as the power of rejection was veſted in *both* the purchaſers, it conſequently operated in *each* of them; and the rejection of one cannot abrogate the right of option with reſpect to the other, as that would be a deſtruction of his right, which is not lawful. The argument of *Haneefa* is that the ſubject of the ſale, when it iſſued from the tenure of the ſeller, was not injured by the defect of *participation*; but if *one* of the purchaſers have the liberty of rejecting his portion *ſingly*, it neceſſarily follows that upon the rejection the ſeller holds the article in partnerſhip with one of the purchaſers; and this is a *defect* in the tenure, to which he was not before ſubject.

Objection.—It would appear that the rejection of *one* of the purchaſers is valid although attended with an injury to the ſeller, ſince the ſeller has himſelf virtually aſſented to it, becauſe in giving ſuch power to *two* perſons, it is evident that he aſſents to a poſſible rejection by *one* of them.

Reply.—The conſent of the ſeller to the injury is inferred from from a ſuppoſition of his having conſented that *one* might reject where the power of rejection was given to *two*. This, however, is not the caſe in the preſent inſtance; for it is to be ſuppoſed that the ſeller underſtood that *both* ſhould declare their rejection *together*; and on *this* ſuppoſition his conſent was given, not on the *other*.

If an article purchaſed under *one* de-ſcription prove to be of deſcription,

If a perſon purchaſe a ſlave on account of his being a *ſcribe*, or a *baker*, and he prove to be neither of theſe, the purchaſer is in that caſe at liberty either to abide by the bargain, or to undo it, as he pleaſes; becauſe the deſcriptive quality being the object he had in the purchaſer may either or

view, and being ſpecified as a condition in the contract, is therefore his right; and the want of it gives him the power of diſſolution if e, becauſe his aſſent ſignified was on this condition, and not otherwiſe.

Objection.—It would appear that the ſale is in this caſe invalid, in the ſame manner in the caſe of purchaſing a *male* ſlave who afterwards proves to be a *female*.

Reply.—The ſale in the caſe quoted is invalid becauſe of difference of *ſex*, which does not exiſt in the caſe in queſtion. Thus a perſon that *is* a baker or *not* a baker is of the ſame *ſex* and differs only in the *quality*; and hence the analogous application of the one caſe to the other is unfounded. It is to be obſerved that a difference of the ſex does not invalidate the ſale, unleſs it defeat the purchaſer's object. Thus the object in the purchaſe of a *man* (for inſtance) is different from that in the purchaſe of a *woman*, and therefore the ſale is invalid in caſe of a difference: if, on the contrary, a man ſhould purchaſe a *he-goat* on the ſuppoſition of its being a *female*, the ſale would not be invalid, but it would remain with the purchaſer to abide by it or not, as he pleaſes. It is to be obſerved, however, that, in the caſe in queſtion, if the purchaſer chuſe to abide by the bargain, he muſt pay the whole of the price; as no diminution is admitted on account of the defect of *quality*, which (as has been before explained) is of a *dependant* nature.

CHAP. III.

Of *Option of Inſpection*[*].

A purchaſer may reject

If a perſon purchaſe an article without having ſeen it, the ſale of article is valid, and the purchaſer after ſeeing it has the option of accepting or rejecting it as he pleaſes. *Shafeï* maintains that a ſale of this nature is wholly invalid, becauſe of the uncertainty with regard to the object of it. The arguments of our doctors are,—FIRST, a ſaying of the prophet, that "*whoſoever purchaſes a thing without ſeeing it, has the liberty of rejection, after ſight of it.* SECONDLY, the uncertainty with reſpect to the object cannot occaſion litigation, ſince, if it be not agreeable, the purchaſer is at liberty to reject it.

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[*] Arab. *Khiâr-al-Rooyat.*

although, before ſeeing it, he ſhould have ſignified his ſatisfaction.

IF a perſon, having purchaſed an article unſeen, ſhould ſay, "I am ſatisfied with it," in this caſe alſo he is at liberty, after ſight of it, to reject it if he pleaſe, for *two* reaſons. FIRST, as the *option of inſpection*, (according to the tradition already quoted) reſts entirely upon inſpection, it follows that it becomes eſtabliſhed by the inſpection, whereas before that it was not eſtabliſhed: and as the acquieſcence ſignified *previous* to the inſpection is not repugnant to this, it conſequently *remains* eſtabliſhed.

OBJECTION.—If the right of option do not exiſt previous to the actual ſight of the article of ſale, it would follow that the purchaſer, before inſpection, has not the power of annulling the contract;—whereas we find, on the contrary, that he is actually poſſeſſed of this power *before* inſpection.

REPLY.—His right to diſſolve the contract, previous to this inſpection, proceeds from the contract not being then binding; and not from any reference to the tradition above quoted.

—SECONDLY, The purchaſer's acquieſcence in the article before he attains an actual knowledge of its qualities, is perfectly nugatory; and hence no regard is paid to his acquieſcence previouſly ſignified:—contrary to his *rejection*, which *is* regarded, becauſe the contract has not as yet become binding.

A *ſeller* has no option of

IF a perſon ſell a thing which he himſelf has not ſeen, he has no *option* after ſale.

*option of inſpection**; becauſe the tradition before cited limits this option entirely to the *purchaſer:* moreover, it is related that *Oſmân* ſold a piece of ground belonging to him at *Baſra* to *Tilha-Bin-Abeedoola*; when a perſon ſaid to *Tilha*, "you have been injured in this "matter;" but he replied, I poſſeſs the liberty of rejection, *having purchaſed a thing unſeen:*—after which another ſaid to *Oſmân*, "You "have been injured in this *ſale*," and he replied, "I have the liberty "of retractation, *having ſold a thing which I had not ſeen:*" upon which *Mazim* was appointed arbitrator between them; and he decreed that the right of option reſted only with *Tilha*; and this decree was given in the preſence of all the companions of the prophet, none of whom objected to it.

The option of inſpection continues in force to any diſtance of the unleſs deſtroyed by circumſtances;

THE right of *option of inſpection* is not, like an *optional condition*, confined to a particular period: on the contrary, it continues in force until ſomething take place repugnant to the nature of it.—It is alſo to be obſerved that whatever circumſtance occaſions the annulment of an *optional condition*, (ſuch as a defect in the merchandiſe, or an exerciſe of right on the part of the purchaſer,) in the ſame manner occaſions an annulment of the option of inſpection. If, therefore, the

ſuch as would have annulled a condition of option.

exerciſe of right be ſuch as cannot afterwards be retracted, (ſuch as the emancipation of a ſlave, or the creating him a *Modabbir*,)—or, if it be ſuch as to involve the rights of others (ſuch as *abſolute ſale*, *mortgage*, or *hire*,)—the option of inſpection is immediately annulled, whether the thing have been ſeen or not; becauſe theſe acts render the ſale binding, and the exiſtence of the option is incompatible with the obligation of the ſale. If, on the contrary, the exerciſe of right be not ſuch as to involve the right of others, (ſuch as a ſale with an *optional condition*, a ſimple *tender* to purchaſe, or a gift without delivery,)

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* That is, he has no power of *retractation*, if, upon inſpection of the article ſold, he ſhould happen to repent of the ſale.

livery,)—the option of inſpection is not *annulled* previous to the *actual ſight* of the article ſold; becauſe acts of this deſcription are not of a ſtronger nature than the *purchaſer's acquieſcence*; and as the purchaſer's *expreſs acquieſcence* to inſpection is not the cauſe of annulling the option of inſpection, (as has been already demonſtrated,) it follows that the acts above deſcribed do not annul it, *a fortiori*;—whereas thoſe acts *after* inſpection annul the option of inſpection, as they indicate an acquieſcence, and an acquieſcence after the ſight of the thing occaſions the annulment of the option.

Option of inſpection is

ticle, where that ſuffices as a ſample of the *whole*.

IF a perſon ſhould look at a heap of grain, or at the outward appearance of cloth which is folded up, or at the face of a female ſlave, or at the face and poſteriors of an animal, and then make purchaſe of the ſame, he has no option of inſpection. In ſhort, it is a rule that the ſight of all the *parts* of the merchandiſe is not a neceſſary condition, becauſe it is often impracticable to obtain it, and therefore it is ſufficient to view that part whence it may be known how far the object of the purchaſer will be obtained. In the purchaſe, therefore, of articles of which the parts are ſimilar, (ſuch as articles ſold by *weight* or *meaſurement of capacity*, and the mode of aſcertaining the goodneſs of which is by preſenting a ſample to the purchaſer) the ſight of a *part* is ſufficient; that is, no option of inſpection can afterwards be claimed unleſs the other parts of the article ſhould prove inferior to the part which has been *ſeen*. In the purchaſe, on the other hand, of things of which the individuals are not ſimilar, (ſuch as cloths or animals,) the ſight of one does not ſuffice;—on the contrary, the purchaſer muſt ſee each individual article. Of this kind are eggs and walnuts, according to *Koorokhee*. (The compiler of this work obſerves, however, that theſe are of the nature of *wheat* and *barley*, ſince their individuals are nearly alike.)—Now ſuch being the eſtabliſhed rule, it follows that the ſight of a heap of wheat is ſufficient, as the quality of what is hidden may be inferred from what is ſeen, wheat being an article ſold by meaſurement of capacity, and the quality of which may conſequently be aſcertained by means of a *ſample:* and in the ſame manner, the ſight of the outſide of a piece of cloth ſuffices, unleſs there be a particular part within the folds neceſſary to be known, ſuch as (in *ſtamped* cloths) the *pattern*, in which caſe the option of inſpection is not annulled until the purchaſer ſee the inſide of the piece. In the caſe of a man *, on the other hand, a ſight of the *face* is ſufficient; and in animals a ſight of the *face* and *poſteriors.*—Some allege that in animals a ſight of the fore and hinder legs is neceſſary. What was firſt related is on the authority of *Aboo Yooſaf.* In goats purchaſed on account of their fleſh it is neceſſary to ſqueeze and preſs the fleſh in the hands, as that aſcertains the goodneſs of it. But if purchaſed for *breed*, or for giving *milk*, it is neceſſary to look at their *dugs*. In purchaſing victuals ready dreſſed it is neceſſary to *taſte* them, to aſcertain their goodneſs.

Option of inſpection in the purchaſe of a *houſe*.

If a perſon look at the front of a houſe, and then purchaſe it, he has no *option of inſpection*, although he ſhould not have ſeen the apartments:—and ſo alſo, if a perſon view the *back* parts of a houſe, or the trees of a garden from without. *Ziffer* has ſaid that it is requiſite that the purchaſer inſpect the apartments of the houſe. Our author alſo remarks that what is here advanced with reſpect to a ſight of the *front* or *back* part of a houſe being ſufficient, is founded on the cuſtoms of former times, when, all their buildings being of an uniform nature, the ſight of the front or back parts ſufficed to aſcertain the *interior* parts; but that in the preſent time it is very neceſſary to enter in, as buildings are in thoſe days variouſly conſtructed, whence a view of the *outſide* is no ſtandard by which to judge of the *inſide*; and this is approved.

An *agent for ſeizin* may in- the

The inſpection of an agent appointed to take poſſeſſion of an article purchaſed is equivalent to the inſpection of the *purchaſer*, and

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* Meaning a *ſlave* ſet up to ſale.

conſequently,

ſame manner as the *purchaſer.*

after the inſpection of ſuch agent, the purchaſer has no power of rejecting the article purchaſed, unleſs in a caſe of a defect. The inſpection, however, of a *meſſenger* on the part of the purchaſer is not equivalent to his *own* inſpection. This is the doctrine of *Haneefa.* The two diſciples hold that an *agent* and a *meſſenger* are in effect the ſame, (that is, the inſpection of neither is equivalent to that of the purchaſer,) and conſequently, that the purchaſer has afterwards the liberty of rejection in both inſtances. The argument they adduce in ſupport of their opinion is, that as the conſtituent has appointed the agent merely to *take poſſeſſion,* and not to annul his option, it follows that ſuch annulment does not belong to him;—in the ſame manner as holds with reſpect to *option from defect*; in other words, if an agent ſhould knowingly take poſſeſſion of a *defective* article, the option of the purchaſer is not thereby annulled;—and in the ſame manner, alſo, as holds with reſpect to a *condition of option*; that is, if a perſon ſhould purchaſe any article, with a reſerve of option, and his agent, in the interval, take poſſeſſion of the article, the purchaſer's right of option is not annulled;—and in the ſame manner alſo, as holds in the *wilful* annulment of an option of inſpection; as if an agent ſhould take poſſeſſion of an article concealed, and after inſpection expreſsly declare the option to be null; in which caſe the purchaſer's right of option would nevertheleſs ſtill continue in force.—*Haneefa,* on the other hand, argues that *ſeizin,* or the act of *taking poſſeſſion,* is of two kinds.—I. *Perfect,* which is the ſeizin of the article with ſight and knowledge. II. *Imperfect,* which is the ſeizin of it *without* ſight, that is, *whilſt it is concealed.* The *firſt* is termed *perfect,* and the ſecond *imperfect,* becauſe the completeneſs of *ſeizin* depends upon the completeneſs of the bargain*, which cannot be complete whilſt an option of inſpection remains; and as, in the *former* inſtance, this option has been done away, it follows that the bargain is in that inſtance complete and perfect; but as, in the *latter* inſtance, on the r, it ſtill continues in force, it follows that the bargain is in that inſtance *imperfect*.—Now as the *conſtituent* is empowered to take poſſeſſion in either of theſe modes, it follows that the agent is equally empowered, ſince his conſtituent has appointed him, in an *abſo* ner, his *agent for ſeizin*. Where, however, an agent takes of an article without ſeeing it, his power is terminated by ſuch imperfect ſeizin, and he conſequently cannot afterwards exert an option of inſpection, ſo as to deſtroy that privilege on the part of his conſtituent by any expreſs declaration. It is otherwiſe in the caſe of an *option from defect*, becauſe, as that is no bar to the completeneſs of the bargain, the ſeizin is in that inſtance *perfect*, notwithſtanding the continuance of the option of defect.—Concerning the caſe of *condition of option* there is a difference of opinion.—Admitting, however, that the agent has *not* the power of annulling ſuch option, it is becauſe the *conſtituent himſelf* is not in this caſe empowered to make a perfect ſeizin, in as much as the *object* of ſuch conditional option is *experience* and *trial*, which can only be acquired *after* ſeizin; and as the conſtituent himſelf is not empowered to make a perfect ſeizin, it follows that his *agent* cannot be ſo.—With reſpect to a *meſſenger*, he poſſeſſes no power, being barely commiſſioned to deliver a meſſage, and cannot therefore be capable of taking formal poſſeſſion of any thing.

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* Arab. *Safka,* literally, the act of *ſtriking hands,* in making a bargain.

The inſpec-

Sale or purchaſe, made by a *blind* perſon, is valid: and after purchaſe, he has ſtill an option, as having purchaſed an article without ſeeing it; which option is determined by the *touch* of the article, provided it be of ſuch a nature that the touch may lead to a knowledge of it; or by the *ſmell*, if it be of a nature to be known by the ſmell; or by the taſte, if the article be of an *eſculent* nature;—in the ſame manner as all theſe modes determine the option of a perſon poſſeſſed of ſight.

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or (in a pur-

option of a blind perſon, in the purchaſe of land, is not de- until a deſcription of the qualities of it be given to him; becauſe ſuch a deſcription is equivalent to a *ſight* of the object, as in the caſe of *Sillim* ſales.—It is recorded from *Aboo Yooſaf*, that if a blind perſon, in purchaſing land, ſhould ſtand on a ſpot whence, if he poſſeſſed his ſight, he might inſpect the whole, and ſhould then declare "I am content with this ground which I have purchaſed," the right of option is annulled; becauſe the ſtanding on the ſpot in this manner is analogous to the *actual view* of it; and the ſemblance is equivalent to the reality where the reality is unattainable; as in the caſe of a *dumb* perſon, the motion of whoſe lips is deemed equivalent to the reading of the *Koran*; or, as in the caſe of a *bald* perſon, with reſpect to whom the motion of the razor to and fro over his head is deemed equivalent (in caſe of his making a pilgrimage to *Mecca*) to *actual ſhaving*.—*Hooſn-Bin-Zeeyád* has ſaid that a *blind* perſon muſt appoint an agent for ſeizin, who may inſpect and take poſſeſſion of the article on his behalf; and this is conformable to the doctrine of *Haneefa*, who is of opinion (as has been already explained) that the inſpection of an *agent* is equivalent to that of his *conſtituent*.

A ſight of

ſtill leaves a power of rejecting *both*.

If a perſon, having ſeen one of two garments, ſhould purchaſe both, and ſhould afterwards ſee the other, he has then the option of *rejecting* both; becauſe, as garments differ eſſentially from one another, a ſight of one is not equivalent to a ſight of *both*; and therefore his right of option remains with reſpect to the one he had not ſeen. He has it not in his power, however, to reject that one ſingly; for in ſuch caſe an alteration in the bargain would take place before the completion of it *, as a bargain is not complete whilſt an option of inſpection remains: and hence it is that the purchaſer may reject the article, independant of an order from the *Kázee*, or the conſent of the ſeller; and ſuch rejection is a diſſolution of the ſale from the beginning,—in other words, it becomes the ſame as if the contract had never exiſted.

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* A contract of ſale, when ſettled by the parties, does not become complete until the execution of it; yet it cannot admit of any alteration of the terms of it in the interval. Thus, if two buſhels of wheat be ſold for two *dirms*, and the parties, before the execution

The option is deſtroyed by the deceaſe e perſon whom

If a perſon poſſeſſing the option of inſpection ſhould die, the option in ſuch caſe becomes null; for (according to our doctors) it is not a hereditament, as has already been explained in treating of *optional conditions*.

Caſes of inſpection *previous* to purchaſe.

If a perſon, having once ſeen an article, ſhould afterwards, at a diſtant period, purchaſe it, and the article, at the time of purchaſe, exiſt in the form and deſcription in which he firſt ſaw it, he has not in this caſe any option, becauſe he is poſſeſſed of a knowledge of the qualities from his former inſpection; and an option is allowed only in *defect* of ſuch knowledge.—If, however, the purchaſer ſhould not recogniſe or know it to be the ſame article, he has in that caſe an option; becauſe under ſuch circumſtances his conſent cannot be implied: or if, on the other hand, the nature of the article be changed, he has an option; becauſe the qualities being changed, it becomes in fact the ſame as if he had never ſeen it.

If a purchaſer and ſeller diſpute concerning any *recent* * change in the nature of the article,—the purchaſer aſſerting this circumſtance,

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of the contract, mutually agree to reduce the ſale to *one* buſhel for *one dirm*, this agreement, as being an alteration of the terms previous to their fulfilment, would be unlawful. In ſhort it is requiſite, in this inſtance, either that the parties previouſly diſſolve the firſt contract, and then enter into a new contract of ſale of one buſhel for one *dirm*; or that they formally complete the firſt contract by mutual ſeizin, and that the purchaſer then ſell one of the buſhels to the ſeller for one *dirm*.

* Arab. *Hâdis*, [or *Hâdith*,] meaning, *ſupervenient upon the contract*.

and the ſeller denying it,—in this caſe the allegation of the ſeller, confirmed by an oath, muſt be credited; becauſe the interval between the ſight and the purchaſe being ſhort, the probability is in favour of the aſſertion of the ſeller, that ſuch change did not happen till after the purchaſe had taken place. If, however, a *long* period ſhould intervene between the ſight and the purchaſe, our doctors are in this caſe of opinion that the allegation of the *purchaſer* is to be credited; becauſe, as it is the nature of every thing to decay in courſe of time, it follows that his aſſertion is ſupported by probability.

If the parties diſpute concerning the period when the article was inſpected, the ſeller aſſerting that the purchaſer had firſt ſeen and then purchaſed the article, and the purchaſer denying this,—in that caſe the allegation of the *purchaſer*, upon oath, is to be credited.

A perſon, after diſpoſing of a *part* of his purchaſe

If a perſon purchaſe a bundle of clothes of a *Zoota*[*] without ſeeing them, and afterwards ſell or give away part of them; in this caſe he has not the power of rejecting any of thoſe that remain unleſs they ſhould prove defective. In the ſame manner, if he purchaſe a bundle of clothes of a *Zoota*, ſtipulating a condition of option, and afterwards ſell or beſtow in gift part of them, his right of option is annulled; becauſe it is not in his power to reject what he has no longer any property in; if, therefore, he were to reject the remainder, it would induce a deviation from the bargain before the completion of it; (for the exiſtence of an option of inſpection, or of a condition of option, is a bar to the completeneſs of the bargain.) It is otherwiſe in an *option from defect*; as the bargain, notwithſtanding the exiſtence of ſuch option, is completed upon ſeizing the article ſold, although it be not complete *before* ſeizin;—but the preſent caſe proceeds on the ſuppoſition of poſſeſſion having been taken. If, however, the ſupervenient deeds of ſale or gift, on the part of the purchaſer, be rendered null, (as if the *ſecondary* purchaſer ſhould undo the bargain on account of the diſcovery of a defect,—or, as if the purchaſer himſelf ſhould recede from his gift,) in this caſe the option of inſpection ſtill remains.—This is from *Shimſh-al-Ayma.* It is related, as an opinion of *Aboo Yooſaf*, that an option of inſpection once annulled cannot again revive, any more than a *conditional* option; and *Kadoore* has adopted this doctrine.

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[*] A tribe of black *Arabs*.—" *Zoot*.—A tribe of *Arabs* who formerly inhabited the " fenny region lying between *Wadis* and *Baſra*; they were defeated and reduced to ſervi" tude by *Mootâſim*, the eighth *Khâlif*."—(*De Herbelot*.)

C H A P.

Of Option from *Defect.*

A purchaſer, [illegible] a [illegible] article purchaſed, is at liberty to re- [illegible] to the

If a perſon purchaſe and take poſſeſſion of an article, and ſhould afterwards diſcover it to have been defective at the time of ſale, it is at his option either to take it for the full price, or to reject it; becauſe one requiſite, in an unconditional contract [of ſale,] is that the ſubject of it be free from defect;—when, therefore, it proves otherwiſe, the purchaſer has no option; for if the contract were obligatory upon him, without his will, it would be injurious to him. He is not, however, at liberty to retain the article, and exact a compenſation, on account of the defect, from the ſeller; becauſe, in a contract of ſale, no part of the price is oppoſed to the *quality* of the article;—and becauſe the ſeller does not conſent to be diveſted of the property for a leſs price than that which he ſtipulates:—if, therefore, the purchaſer were to retain the defective article, and exact a compenſation from the ſeller on account of the defect, it would be injurious to the latter:—but it is poſſible to obviate the injury to the purchaſer without entailing an injury on the ſeller, by permitting him either to retain the article, if he approve of it with the defect, or to reject it.—If, however, the purchaſer, at the time of ſale, or of taking poſſeſſion, be aware of the defect, and nevertheleſs knowingly and wilfully make the purchaſe, or take poſſeſſion, no option remains to him; becauſe when he thus purchaſes or takes poſſeſſion of the article, it is evident that he aſſents to the defect.

unleſs he was aware of the defect *beforehand.*

WHATEVER may be a cauſe of diminiſhing the price amongſt merchants is conſidered as a defect; becauſe injury is occaſioned by deficiency in point of value; and deficiency in point of *value* occaſions deficiency in *price*; and the mode of aſcertaining this is by conſulting merchants who are practiſed in eſtimating the value of articles.

Whatever tends to *depreciate* an article is a

A DISPOSITION to abſcond, or to make urine upon carpets, or to commit theft, are defects in children during their nonage, but not after they attain to the age of maturity. If, therefore, any of theſe defects appear in an infant ſlave during childhood whilſt in the hands of the ſeller, and afterwards appear in him during childhood whilſt in the hands of the purchaſer, he [the purchaſer] is in that caſe at liberty to return him to the ſeller, in virtue of *option from defect*; becauſe this is the ſame defect that exiſted whilſt in the poſſeſſion of the ſeller. If, on the other hand, any of theſe defects ſhould occur in him, in the purchaſer's hands, after he attains to maturity, the purchaſer is not at liberty to return him by *option from defect*; becauſe this defect is different from that which appeared during childhood in the hands of the ſeller, ſince theſe effects proceed from different cauſes in the periods of childhood and maturity; for the making of urine upon a

ſale of a ſlave during in-carpet (for inſtance) during the time of childhood, is owing to a weakneſs in the bladder,—whereas, after maturity, it ariſes from a diſeaſe in the interior parts; and, in the ſame manner, the *running away* of a child is from a deſire of play; and the commiſſion of theft from *thoughtleſſneſs*; but theſe, where they occur after *maturity*, are the effect of *innate wickedneſs*.—By a *child* is here meant one in its *perfect ſenſes*; for a child not in its perfect ſenſes is incapable of *running away*; whence it is that the term uſed in that caſe is *loſt* or *ſtrayed*, not *abſconded*:—the running away, therefore, of ſuch a one is not a *defect*.

after the ſale.

Madness during infancy operates as a perpetual defect:—in other words, if an infant ſlave be ſubject to lunacy in the hands of the ſeller, and the lunacy recur whilſt in the hands of the purchaſer, whether during childhood or after maturity, the purchaſer is at liberty to return him to the ſeller; becauſe this madneſs is in effect the ſame as had originally exiſted whilſt the ſlave was yet in the ſeller's hands, as being occaſioned by the ſame cauſe, namely, an internal malady.—It is not, however, to be underſtood (as ſome have imagined) that the return of the madneſs is not required as a condition to enable the purchaſer to diſſolve the bargain; for God Almighty, as being all powerful, may remove the madneſs, although that ſeldom happen. Hence it is neceſſary that the madneſs return, to enable the purchaſer to diſſolve the bargain; for, unleſs it actually return, he has not this priviledge.

which operate in the ſale

not of *males*.

A bad ſmell, from the breath or armpits, is a defect in regard to *female* ſlaves, becauſe in many inſtances the object is *to ſleep* with them; existence of ſuch defects is a bar to the accompliſhment of that object.—Theſe, however, are not defects with regard to *male* ſlaves; becauſe the object, in purchaſing them, is merely to uſe their ſervices; and to this theſe defects are not obſtacles, ſince it is poſſible for a ſlave to ſerve his maſter without the neceſſity of the maſter's ſitting down with him, ſo as to receive annoyance from theſe defects.—If, however, they proceed from diſeaſe, they are conſidered as defects with regard to *male* ſlaves alſo.

WHOREDOM and *baſtardy* are defects with regard to a *female* ſlave, but not with regard to a *male*; becauſe the object, in the purchaſe of a *female* ſlave, is cohabitation and the generation of children, which muſt be affected by either of the above circumſtances; whereas, the object in the purchaſe of a *male* ſlave is the *uſe of his ſervices*, the value of which is not depreciated by his committing whoredom.—If, however, a male ſlave be *much addicted* to whoredom, our lawyers are of opinion that it is a defect, becauſe in the purſuit of women he neglects the ſervice of his maſter.

Infidelity is a defect in both *male* and *female* ſlaves.

INFIDELITY is a defect in both a male and female ſlave[*]; becauſe the diſpoſition of a *Muſſulman* is averſe to the ſociety of infidels; and alſo, becauſe as, in the expiation of murder, the emancipation of an infidel ſlave does not ſuffice, it follows that the poſſeſſion of ſuch a ſlave is not what is deſired, ſince a part of the object is thus defeated. If, on the contrary, a perſon ſhould purchaſe a ſlave, on condition of his being an *infidel*, and he afterwards prove a *Muſſulman*, the purchaſer has no power of diſſolving the bargain, ſince the exemption from infidelity is no defect.

Conſtitutional infirmities are defects in a female ſlave.

A TOTAL ſuppreſſion of the courſes, or an exceſſive evacuation of them, are defects with reſpect to a female ſlave, as they proceed from internal maladies. It is to be obſerved, however, that the want of the courſes is not conſidered as a defect until the extreme period of maturity be elapſed, which in *females* (according to *Haneefa*) is *ſeventeen years*; and this knowledge muſt be had from the information of the ſlave herſelf.—If, therefore, a perſon purchaſe a female ſlave arrived at full maturity, (that is, ſeventeen years of age,) and learn from herſelf that her courſes have not appeared, he is then entitled to return her to the ſeller before taking poſſeſſion; and even *after* taking poſſeſſion, provided the ſeller ſimply deny the circumſtance, and refuſe to confirm it with an oath. If, however, the ſeller deny the circumſtance upon oath, the purchaſer is not entitled to return her.

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[*] That is, ſuppoſing the ſlave to be purchaſed as a *Muſſulman*, and he prove to have been an infidel at the time of purchaſe.

A purchaſer is entitled to

in an article where it has ſuſtained a further blemiſh in his hands; but he cannot, in this caſe, re-

an article, after being ſold, ſhould receive a blemiſh in the of the purchaſer, and the purchaſer ſhould afterwards learn that it had alſo a blemiſh at the time of ſale, he is, in that caſe, entitled to receive from the ſeller a compenſation for the defect; but he is not permitted to return it to him, as that would be attended with an injury to the ſeller, ſince it would neceſſitate him to receive again into his property a thing with *two* blemiſhes which, in iſſuing from him, had only *one*. As, therefore, the return of the article is in this caſe impracticable, and as it is neceſſary to remove injury from the purchaſer, the expedient of entitling him to a compenſation from the ſeller for the defect has been deviſed: unleſs, however, the ſeller ſhould conſent to receive it with the two blemiſhes, and voluntarily acquieſce in his own loſs.—By the phraſe *compenſation for defect*, is to be underſtood, throughout this work, the difference between the value of an article in its *perfect* ſtate, and the value it afterwards bears in its *defective* ſtate.

A purchaſer is entitled to compenſation

after the article has been cut up;

If a perſon purchaſe *cloth*, and cut it up, and then, before he had begun to ſew it, diſcover it to be defective, he is in this caſe entitled to a compenſation for the defect from the ſeller; becauſe although, in conſequence of the cloth being cut, a bar be oppoſed to the returning of it to the ſeller, (as the cutting is a defect which the purchaſer himſelf is the occaſion of,) yet the return is eventually poſſible, by the ſeller's acquieſcing in it, which he may do if he pleaſe, ſince the bar is oppoſed only in tenderneſs to his right; and this right it is in his power to forego. If, however, after cutting the cloth, the purchaſer ſhould ſell it to another, he is not then entitled to any compenſation for the defect; for although, after cutting the cloth, the bar to his returning it to the ſeller may be eventually removed, by his [the ſeller's] acquieſcence, yet when the purchaſer afterwards diſpoſes of it to another, he himſelf fixes a bar to the poſſibility of its being returned to the ſeller, for which reaſon he is not entitled to a compenſation for the defect.

unleſs, after cutting, he put it out of his power to reſtore it to the ſeller:

IF a perſon purchaſe cloth, and, after cutting, either dye it or ſew it,—or purchaſe flour, and mix it up with oil,—and afterwards diſcover the article to be defective, he is in that caſe entitled to a compenſation for the defect; becauſe the return of the article to the ſeller is in either of thoſe inſtances impracticable, as it has become implicated with a thing which cannot be ſeparated; it is therefore impoſſible to return the article ſimply *by itſelf*; nor can it be returned *with the addition*, ſince the addition was not in any reſpect a ſubject of the ſale; and the ſeller, moreover, is not at liberty to receive it back with ſuch addition, becauſe the obſtacle to the return, in theſe inſtances, is not in right of the *ſeller*, but in right of the LAW *. If the purchaſer, therefore, in any of theſe inſtances, ſhould ſell the article, after diſcovering it to be defective, he is ſtill entitled to a compenſation from the ſeller; becauſe, as the bar to his returning the article to him exiſted previous to the ſale of it on *his* part, he cannot by ſuch ſale be conſidered as the cauſe of detaining it from the ſeller.

or, if the return be render

wrought upon the ſubject *prior* to the

compenſation for defect,

IF a perſon purchaſe cloth, and cut it out for clothing on account of an infant ſon, and after having ſewn it up diſcover a defect in it, he is not entitled to a compenſation for the defect from the ſeller. If, however,

Appropriation of a
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* Becauſe the LAW (meaning the text of the *Koran*) forbids *uſury*, under which head this tranſaction falls, as being the receipt of an *addition*, with the *original*.

by precluding a return to the ſeller, leaves the right to compenſation for a defect.

however, the ſon in this inſtance be an adult, the purchaſer is entitled to ſuch compenſation.—The reaſon of this diſtinction is that, in the former inſtance, the right of property, with regard to the infant, takes place immediately on the cutting of the cloth, and *previous* to its being ſewn; and conſequently, as the purchaſer by this act inveſts the infant with a right of property immediately upon cutting the cloth, he becomes the cauſe of the detention of it from the ſeller previous to its being ſewn, and is therefore not entitled to the compenſation:—in the *latter* inſtance, on the contrary, the right of property with regard to the *adult* does not take place upon the ſewing, nor until he actually *take poſſeſſion* of the garment; and hence, as it is by the *ſewing*, and not by the *inveſtiture in the adult*, that the return of the cloth to the ſeller becomes impracticable, it follows that the purchaſer, by making this inveſtiture, does not detain the cloth from the ſeller, and conſequently, that he is entitled to a compenſation *.

The purchaſer of a

for defect, after the death or

If a perſon purchaſe a ſlave, and afterwards emancipate him,—or the ſlave die in his hands, and the purchaſer then become acquainted with his having been defective, he is in either caſe entitled to a compenſation from the ſeller:—in caſe of the ſlave *dying*, becauſe death renders his property in the ſlave complete and perfect, and the impracticability of returning him does not ariſe from any act of the *purchaſer*, but from an unavoidable calamity;—and alſo in caſe of his emancipating the ſlave, upon a favourable conſtruction of the law.—Analogy would ſuggeſt that in this laſt caſe the purchaſer is not entitled to a compenſation, becauſe the obſtacle to the return proceeds, in this inſtance, from the act of the purchaſer: the caſe, therefore, is the ſame as if he had *killed* the ſlave; and as, in that caſe, he would not have been entitled to any compenſation for defect, ſo in this inſtance likewiſe. He is, however, ſo entitled, upon a favourable conſtruction, becauſe by the emancipation his property attains to its height and completion; for MAN is not, in his original nature, a ſubject of property, all men being originally created free; nor can any right of property exiſt with reſpect to him but under reſtriction, and of limited duration, continuing in force no longer than until he be made free: emancipation, therefore, like death, occaſions a completion of right of property, and it may conſequently be ſaid that a right of property ſtill remains in the ſubject of the ſale, notwithſtanding the impoſſibility of returning it, as a thing is rendered fixed and unalterable by its completion.—It is to be obſerved that conſtituting the ſlave a *Modabbir* or an *Am-Walid* is, in this particular, equivalent to *emancipation.*

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* As an infant is incapable of taking poſſeſſion in a caſe of *gift*, the property veſts in him immediately on the declaration of the donor, or on his [the donor's] performing ſome act which manifeſts his intention, as in the cutting of the cloth by the purchaſer in the above caſe: in the caſe of an *adult* perſon, on the contrary, *actual ſeizin* is requiſite to an inveſtiture with right of property.

but not after

it
gr
return
property:

IF a perſon purchaſe a ſlave, and afterwards emancipate him in return for property *, and then diſcover him to have been defective, he is not entitled to a compenſation from the ſeller, as the detention of the *return* is, in effect, a detention of the *conſideration.*—It is recorded, from *Haneefa*, that the purchaſer is in this caſe alſo entitled to a compenſation; becauſe an emancipation, whether it be gratuitouſly made or otherwiſe, occaſions the completion of the right of property.

nor after his *death*, where he has been

IF a perſon purchaſe a ſlave, and afterwards put him to death, and then diſcover him to have been defective, he is not entitled to a compenſation for the defect, according to *Haneefa.*—This alſo is agreeable to the *Zâhir-Râwayet.*—It is reported, from *Aboo Yooſaf*, that the purchaſer is entitled to a compenſation; becauſe the law annexes worldly puniſhment to the murder of a ſlave by his maſter [*], and caſe is therefore the ſame as if he had died a natural death. The principle on which the *Zâhir-Râwayet* proceeds is that *murder*, wherever it takes place, occaſions reſponſibility; and as, in the caſe of a maſter killing his ſlave, the reſponſibility is remitted only on account of the maſter's right of property, the maſter conſequently, as it were, takes the reſponſibility [†] in return for his right of property: the caſe is therefore the ſame as if he had *ſold* the ſlave. It is otherwiſe where he emancipates him without any return, as that act does not occaſion reſponſibility, any more than where a poor perſon emancipates his portion in a *partnerſhip* ſlave [‡].

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* See *Manumiſſion for a*

A purchaſer of *food* is not entitled to a
ter having *eaten* it;

If a perſon purchaſe any articles of food, and eat them, and be then informed of a defect in them, in that caſe, according to *Haneefa*, he is not entitled to any compenſation from the ſeller.—According to the two diſciples he is entitled to a compenſation.—The ſame difference of opinion ſubſiſts with reſpect to the caſe of a perſon who, having purchaſed garments, and worn them until they had become ragged, then diſcovers that a defect had formerly exiſted in them.—The arguments of the two diſciples are that the purchaſer having performed no act with reſpect to the ſubject of the ſale but what is agreeable to the object of the purchaſe, and what is cuſtomary, the caſe is therefore the ſame as if he had emancipated a ſlave.—The argument of *Haneefa* is that the return of the food to the ſeller is impracticable, becauſe of the purchaſer having performed an act with regard to it which induces reſponſibility; and the caſe is therefore the ſame as that of ſale or of murder. The act of a purchaſer, moreover, although it be the object of the purchaſe, is nevertheleſs diſregarded; whence it is that the purchaſer is entitled to no compenſation for a

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[*] That is, it only ſubjects the murderer to expiation by charity, faſting, or other religious pennances.

In other words, "*bears the loſs.*"

[‡] See Vol. I. p.

defect,

, after having ſold the goods, notwithſtanding *ſale* be one of the

and ſo alſo, after having eaten only a *part* of the food.

If a perſon purchaſe certain articles of food, and eat part of them, and then diſcover them to be defective, he is not, according to *Haneefa*, entitled to return to the ſeller what remains, and to demand from him a compenſation for the defect in what he had eaten; becauſe proviſions are in the nature of an unity; and the caſe is therefore the ſame as if a perſon were to ſell part of goods purchaſed by him, and then to diſcover a defect in them; in which caſe he would not be entitled to return the remainder to the ſeller, and demand a compenſation for the defect; and ſo alſo in the caſe in queſtion.—There are two opinions of the two diſciples on this caſe.—According to one opinion, the purchaſer may retain the remaining part of the proviſions, and receive from the ſeller a compenſation for the defect of the whole: and, according to the other, he may return the remaining part to the ſeller, and receive a proportionable compenſation for the defect of what he had eaten.

Caſe of defect in very periſhable commodities.

If a perſon purchaſe eggs, muſk melons, cucumbers, walnuts, or the like, and after opening them diſcover them to be of bad quality; in that caſe, if they be altogether unfit for uſe, the purchaſer is entitled to complete reſtitution of the price from the ſeller, as the ſale is invalid, becauſe of the ſubject of it not being in reality *property*.—If, on the other hand, notwithſtanding their badneſs, they be ſtill fit for uſe, the purchaſer is not entitled to return them to the ſeller, becauſe the opening of them is an additional defect of his own creation: he is, however, entitled to a compenſation for the defect; as by this means the injury he would otherwiſe ſuſtain is remedied to the greateſt poſſible extent. *Shafeï* has ſaid, that he is entitled to return them after opening them; becauſe that is the exerciſe of a power committed to him by the ſeller. In reply to this our doctors argue, that the ſeller has empowered him to open them in virtue of his becoming the proprietor. Hence the caſe is the ſame as where a perſon purchaſes a garment, and, after having cut it, diſcovers a defect in it; in which caſe the purchaſer is not entitled to return the garment upon the ſeller's hands, although he [the ſeller] had authorized him to cut it down.—In ſhort, if the articles prove defective only in a *ſmall part*, the ſale is valid, upon a favourable conſtruction, becauſe it is incident to walnuts, and ſuch other articles, to be bad in a *ſmall* part; (by a ſmall part is meant what is *commonly* the caſe, ſuch as one or two in a hundred:) but if, on the other hand, a *great* part prove bad, the ſale is invalid, and the purchaſer is entitled to a complete reſtitution of the purchaſe-money; becauſe in this caſe the ſeller has united together entities and non-entities with regard to value; and the caſe is therefore the ſame as if a perſon were to ſell together *freemen* and *ſlaves*.

purchaſer ſelling what he has purchaſed, which
him in conſequence of a defect.

If a perſon, having purchaſed a ſlave, ſhould ſell him to another, and that other return the ſlave to him on diſcovering him to be defective, and he agree to receive him back, on the *Kâzee*'s iſſuing a decree to that effect, founded on the proof of the defect by witneſſes, or on the refuſal of the firſt purchaſer to confirm his denial upon oath,—in that caſe the firſt purchaſer is entitled to return the ſlave to the ſeller; becauſe, although it be not lawful for a purchaſer, after the ſale of the article on his part, to return it to the ſeller, ſtill in this caſe, the ſecond ſale having been annulled by the *Kâzee*, it becomes the ſame as if no ſuch ſale had ever exiſted.

Objection.—As the firſt purchaſer denied the defect, and obliged the ſecond purchaſer to eſtabliſh the fact by witneſſes, it would appear that he is not entitled to return the ſlave; becauſe, if he ground his right on the defect, he is guilty of prevarication, ſince he firſt *denies* the defect, and then *aſſerts* it.

Reply.—The diſproof of the denial by the *Kâzee*'s decree, founded on the proof of the fact by witneſſes, renders ſuch denial of no validity in law; hence the apparent contrariety of his denial and aſſertion is reconciled, and as the firſt ſale continues in force, and the defect is at the ſame time proved, it follows that he is entitled to return the ſlave to the ſeller.—If, therefore, he chuſe to return him, it is a valid rejection:—but if he ſhould rather chuſe to keep him, the ſale continues in force.—It is otherwiſe where an *agent for ſale* diſpoſes of an article, and the purchaſer returns it to the agent in conſequence of a defect;—for this is in reality a return to the *conſtituent*; and the agent is not required to return the article to his conſtituent, becauſe, in this caſe, there is only *one* ſale, whereas in the caſe in queſtion there are *two*, whence the diſſolution of the *ſecond* ſale does not diſſolve the *firſt*.—In ſhort, if the *ſecond* purchaſer, on the diſcovery of a defect, return the ſlave, and the firſt purchaſer receive him back, in conſequence of a decree of the *Kázee*, he [the firſt purchaſer] is in that caſe entitled to return him to the original ſeller.—If, on the other hand, the firſt purchaſer agree to receive him back without a decree of the *Kázee*, he in that caſe is not entitled to return him to the original ſeller, becauſe, although the ſecond ſale be annulled with regard to himſelf and the ſecond purchaſer, ſtill it is equivalent to a ſale *de novo* with regard to all *other* perſons; and the original ſeller is *another* perſon.—It is recorded, in the *Jama Sagheer*, that when the ſubject of the ſale is returned to the firſt purchaſer, *without* a decree of the *Kázee*, on account of ſuch a defect as *very rarely* happens, (ſuch as an *additional finger*, for inſtance,) the firſt purchaſer has not the power of returning it to the original ſeller; and this (as our author remarks) is a direct proof that the effect is the ſame in both caſes; that is, whether the defect be of ſuch a nature as may have recently happened, or ſuch as never recently happens.—In ſome traditions it is mentioned, that in the latter caſe the purchaſer may return the ſubject of ſale to the original ſeller, as there is then a certainty that ſuch defect *did* exiſt whilſt in the hands of the original ſeller.

Conduct to be obſerved by the magiſtrate, in caſe of a purchaſer, after taking poſſeſſion, alleging a defect in the article.

If a perſon purchaſe a ſlave, and take poſſeſſion of him, and then aſſert a defect in him, the *Kázee* in ſuch caſe muſt not enforce the payment of the price on the part of the purchaſer until he ſhall have inveſtigated his aſſertion, either by the declaration of the ſeller, upon oath, that the ſlave had no defect, or by the proof of the fact on the part of the purchaſer by witneſſes. The ſuſpenſion of the *Kázee's* decree with regard to the payment of the price is requiſite, leſt ſuch decree ſhould be rendered vain and uſeleſs by the ſubſequent proof of the defect; and alſo, becauſe the tenor of ſuch decree is that the *purchaſer ſhall pay the complete price in fulfilment of the ſpecific claim of the ſeller*,—whereas the purchaſer, by aſſerting a defect, *denies* the obligation on him to pay the complete price. The *Kázee*, therefore, muſt firſt proceed to examine into the circumſtance of the defect; and if the purchaſer ſhould ſay that his witneſſes are in *Syria**, he muſt then exact from the ſeller his denial upon oath. If the ſeller ſhould take the oath accordingly, the *Kázee* muſt then decree the payment of the price;—becauſe in ſuſpending the price till the arrival of the witneſſes an injury would reſult to the ſeller; and the immediate enforcement of the payment does not in ſo great a degree injure the purchaſer, becauſe after the return of the witneſſes from *Syria*, if he ſhould eſtabliſh his proof, the purchaſe-money will be returned to him on his returning the ſlave to the ſeller.—If, however, the ſeller ſhould refuſe to take an oath in ſupport of his denial, the aſſertion of the purchaſer is then eſtabliſhed, as ſuch refuſal is an argument in favour of the exiſtence of the defect.

Caſe of a purchaſer alleging the exiſtence of a *defective property* before he had made the purchaſe;

If a perſon, having purchaſed a ſlave, ſhould afterwards aſſert that "he had *run away* from him, and had alſo run away *whilſt in the* "*poſſeſſion of the ſeller*," and the ſeller offer to take an oath that "he "had never run away from *him*" [the purchaſer,] the *Kázee* muſt in that caſe refuſe to receive his depoſition, until the purchaſer firſt

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* That is, at ſuch a diſtance as renders their appearance in court impracticable.

prove

and the forms
of depoſition
to be required

prove by witneſſes that "he had run away from *him*" [the ſeller,] after which the *Kâzee* muſt tender an oath to the ſeller to this purport, "by GOD, I have ſold the ſaid ſlave and delivered him to the "purchaſer, and he never ran away *whilſt he belonged to me*:" (as is mentioned by *Mohammed* in the *Jama*:)—or to *this* purport, "by "GOD, the purchaſer has no right to return to me ſuch ſlave, on ac- "count of the defect which he aſſerts:"—or in this manner, "by "GOD, ſuch ſlave never ran away whilſt he belonged to me."—He muſt not, however, tender an oath to him to *this* purport, "by GOD, "I ſold the ſaid ſlave at a period when he had not the ſaid defect:"—nor in *this* manner, "by GOD, I ſold the ſaid ſlave and delivered him "to the purchaſer, at a period when he had not the ſaid defect;"—becauſe, in taking ſuch oaths, the meaning of the ſeller may be, that "although he *had* ſuch a defect *formerly*, yet he had it not *at the* "*identical period of ſale or delivery*;" and thus, without any deviation from truth, he may defraud the purchaſer of his right. If the purchaſer ſhould not be able to prove, by witneſſes, that the ſlave had run away from him [the purchaſer,] the oath, in that caſe alſo, (according to the two diſciples,) muſt be tendered to the ſeller.—Our modern doctors have differed concerning the opinion of *Haneefa* upon this point; as ſome of them ſay that, according to him, an oath is not to be adminiſtered to the ſeller in this inſtance.—The argument of the two diſciples is, that as the aſſertion of the plaintiff is worthy of regard, and ſuch as would be attended to in caſe of its being proved by witneſſes, it follows that in default of ſuch witneſſes the ſeller muſt be required to deny the aſſertion upon oath.—The reaſoning of *Haneefa* (as recorded by thoſe who have ſaid that, according to him, an oath is *not* to be adminiſtered to the ſeller) is that the form of ſwearing a defendant has been ordained by the LAW for the purpoſe of removing any litigation that may happen to ariſe,—not for the purpoſe of *exciting* litigation. Now, in the preſent caſe, the exaction of an oath from the ſeller will only give birth to a new litigation; becauſe, in caſe he ſhould refuſe to take it, and the proof of the fact be thence eſtabliſhed, it will become a new ſubject of contention whether the ſaid defect did exiſt or not during his being in the ſeller's poſſeſſion, and there will be a neceſſity for tendering to him another oath, upon this point, for the purpoſe of removing this freſh cauſe of diſpute.

If a perſon purchaſe a *female* ſlave, and having received her from the ſeller, ſhould, on the diſcovery of a defect, deſire to return her, and the ſeller aſſert that "he had ſold *two* female ſlaves to "the purchaſer of which he only produced *one*," and the purchaſer maintain, on the other hand, that "he had only ſold *one*,"—in that caſe the declaration of the purchaſer, upon oath, is to be credited; for, as the diſagreement here relates to the *quantity* taken poſſeſſion of, the perſon who *took poſſeſſion* muſt be credited, as being the moſt competent judge;—in the ſame manner as holds in a caſe of uſurpation;—that is, if the perſon whoſe property is uſurped aſſert the uſurpation of a *particular quantity*, and the uſurper deny the quantity, his declaration upon oath is to be credited;—and ſo alſo in the caſe in queſtion. If, on the other hand, the purchaſer and ſeller agree in the extent of the *ſale*, but differ with reſpect to that of the *ſeizin*, (as if both ſhould allow the two female ſlaves to have been the ſubject of the *ſale*,—the ſeller aſſerting that "the purchaſer had received *both*," and the purchaſer, on the other hand, maintaining that "he had only "received *one*,")—in that caſe alſo the declaration of the purchaſer, oath, is to be credited, for the reaſon already explained.

Caſe of a perſon purchaſing *two ſlaves*, one of whom proves defective.

If a perſon purchaſe two ſlaves by one contract, and take poſſeſſion of one, and then diſcover the other to be defective, he is not in that caſe permitted to retain the one he had taken poſſeſſion of, and to relinquiſh the other; but he has the option of either retaining or relinquiſhing both; becauſe until both be taken poſſeſſion of the terms of the contract are not fulfilled; and hence, if he ſhould retain one and relinquiſh the other, it would induce a deviation from the bargain previous to its fulfilment, which (as was before explained) is unlawful. If the defect ſhould lie in the ſlave of which poſſeſſion had been taken, in that caſe there is a diſagreement among our doctors. It is recorded, from *Aboo Yooſaf*, that the purchaſer is in ſuch caſe entitled to return the *defective* ſlave only. The more approved doctrine, however, is that he muſt retain both or relinquiſh both; becauſe the fulfilment of the bargain reſts upon a complete poſſeſſion of the ſubject of the ſale, namely the *two ſlaves*. This caſe, therefore, reſembles a caſe of detention of the article ſold, in ſatisfaction for the price: that is, if the ſeller ſhould detain the goods in ſatisfaction for the price, ſuch detention cannot be abrogated until he actually receive complete poſſeſſion of the price; and in the ſame manner, in the caſe in queſtion, the bargain is not perfected, until the purchaſer receive complete poſſeſſion of the articles ſold. If, however, in the caſe in queſtion, the purchaſer ſhould have made ſeizin of both, and ſhould afterwards diſcover a defect in one of them, he is then entitled to return the defective one *ſingly*. *Ziffer* has given a different opinion; becauſe in this caſe a deviation from the bargain takes place; and it is not free from injury, ſince it is an eſtabliſhed cuſtom, in ſales, to unite good and bad things together: the caſe is therefore the ſame as if he had rejected one before the ſeizin of the whole,—or, as if he had made the purchaſe under a condition of option, or, with an option of inſpection. Our doctors, on the other hand, allege that in this caſe the deviation from the bargain takes place *after* the fulfilment of the contract; becauſe the ſeizin of the goods renders the contract complete; and the exiſtence of the option of defect does not operate againſt the completion of the contract after ſeizin. A deviation, moreover, from the bargain, after the fulfilment of it, is lawful, as has been already demonſtrated: whence it is that if, after taking poſſeſſion of both ſlaves, one of them ſhould be found to be the property of another, the purchaſer is not in that caſe at liberty to return *both* to the ſeller; but muſt retain one, and receive from the ſeller a deduction of the price, on account of the one belonging to another, notwithſtanding this be a deviation from the bargain:—contrary to *conditional options*, or *options of inſpection*, for the exiſtence of ſuch conditions is a bar to the fulfilment of the bargain, notwithſtanding ſeizin may have taken place.

In the purchaſe of articles of
capacity, the part which proves de-
ſeller.

If a perſon purchaſe articles eſtimable by *weight*, or by *meaſure of capacity*, (ſuch as ſilver or wheat, for inſtance,) and he afterwards diſcover the article to be in part defective, he is entitled, in that caſe, either to return the whole to the ſeller, or to retain the whole; but he has not the power of returning the *defective* part only, becauſe the unities of articles eſtimable by weight or by meaſure of capacity are conſidered as forming one individual, provided they be all of the *ſame ſpecies*. Some have alleged that this proceeds on a ſuppoſition of the articles in queſtion being contained in one veſſel; but that, if they be contained in *two*, the one containing the defective article may be returned, and the other retained.

If a *part* of
property of another, ſtill the purchaſer
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If, after the purchaſe of articles eſtimable by weight, or meaſurement of capacity, a part of them ſhould prove to be the property of another, the purchaſer is not in that caſe allowed to return the remainder to the ſeller; becauſe no injury can reſult to him from his being obliged to keep them, as articles of this nature may be ſeparated and divided without ſuſtaining any blemiſh, and the proof of part of the ſubject of the ſale having been the property of another is no impediment to the completion of the contract, ſince that depends on the conſent of the *ſeller* and *purchaſer*, and not of the perſon who is diſcovered to be the proprietor of a part. This is where poſſeſſion has been taken by the purchaſer, *before* a part of the ſubject is diſcovered to be the right of another;—for if the right of property of the other be diſcovered previous to the purchaſer taking poſſeſſion, he is, in that caſe, entitled to return the remainder, ſince a deviation from the contract takes place previous to the completion of the bargain. If the articles be not ſuch as are eſtimable by weight, or meaſurement of capacity, 5, for inſtance, then the purchaſer is entitled to return the remainder to the ſeller at all events, as diviſion and ſeparation of the article would, in this inſtance, prove an injury to it.

If a perſon purchaſe a female ſlave, and diſcover that ſhe has an *ulcer* or ſome other ſuch ailment, and apply a remedy to it,—or, if a perſon purchaſe an animal, and diſcover it to be defective, and ride upon it on ſome buſineſs of his own,—the application of a remedy in the one caſe, or the act of riding in the other, indicate an acquieſcence in the defect on the part of the purchaſer, and he is therefore not entitled to return either the ſlave or the animal on the plea of an option from the diſcovery of a defect. It would be otherwiſe if he had purchaſed the animal on a *condition of option*; for the object of ſuch condition is an *experimental knowledge*, which cannot be obtained but by a *trial.* If, moreover, he were to ride upon the animal, *not* on his *own* buſineſs, but merely with an intention of reſtoring it to the ſeller, no inference could be drawn of his acquieſcence in the defect;—and ſo alſo, if he were to ride upon the animal with an intention of giving it *water* or *forage*; provided, however, the riding for theſe purpoſes be unavoidable, either becauſe of the animal being unruly and ungovernable, if not mounted, or becauſe of the purchaſer himſelf being incapable of walking.

A purchaſer,

making uſe of

power of returning it to the ſeller.

If a perſon purchaſe and take poſſeſſion of a ſlave, not knowing that he had formerly, whilſt in the poſſeſſion of the ſeller, been guilty of theft, and the theft be afterwards proved, and the ſlave ſuffer amputation for it in the ſeller's hands, the purchaſer is, in that caſe, entitled, according to *Haneefa*, to return him to the ſeller, and receive back the whole of the price. According to the two diſciples, the purchaſer is ſtill to keep poſſeſſion of the ſlave, and to receive from the ſeller the difference between the value whilſt in his perfect ſtate, and that which he bears after his hand is cut off. The ſame diſagreement ſubſiſts in caſe of a ſlave ſuffering death whilſt in the poſſeſſion of

If a purchaſed ſlave ſuffer amputation for a theft

return him

and ſo alſo, if he ſuff *death*,

crime committed with the ſeller.

of the purchaſer, for a crime he had committed whilſt in the ſion of the ſeller; *Haneefa* being of opinion that the purchaſer is entitled to a reſtitution of the whole of the price; and the two diſciples, that he is entitled only to the difference between the value of the ſlave *before* his blood has become neutral, and that which he bears after it has been neutral *. In ſhort, according to *Haneefa*, the exiſtence of a cauſe of mutilation or death is equivalent to *a claim of right* †,—whereas, according to the two diſciples, it is equivalent to a *defect*. The reaſoning of the two diſciples is that the *cauſe* only of mutilation or death occurred with the ſeller, but not the actual death or mutilation itſelf;—now the exiſtence of a cauſe of death or mutilation is not repugnant to the ſubject being *property*; the ſlave, therefore, notwithſtanding the exiſtence of the *cauſe* of mutilation or death, is nevertheleſs property, and capable of being the ſubject of a ſale; as, however, a ſlave in whom exiſts a cauſe of death or mutilation is *defective*, it follows that the purchaſer is entitled to receive from the ſeller a compenſation for the deficiency, where the return has become impracticable; and in either of theſe inſtances the return *is* impracticable;—where he ſuffers death evidently; and alſo where he ſuffers mutilation; becauſe ſuch mutilation is a defect that has taken place in the hands of the purchaſer;—in the ſame manner as where a perſon purchaſes a pregnant female ſlave, being ignorant of the circumſtance, and the ſlave dies in labour, in which caſe the purchaſer is entitled only to a compenſation for the difference between the price which ſhe bore when not pregnant, and that which ſhe bore when pregnant. The reaſoning of *Haneefa* is, that the *cauſe* of mutilation and death occurred with the *ſeller*; and as a cauſe induces its effects, the death or mutilation muſt be referred to the period of the *cauſe*. The caſe is, therefore, the ſame as if a perſon

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[*] That is, has become forfeited to the LAW, and conſequently liable to be ſhed without reſponſibility.

[†] In other words, is the ſame, in effect, as if the ſlave, after the purchaſe, ſhould prove to be the property of *another perſon*.

were to uſurp a ſlave, and the ſlave, whilſt in his poſſeſſion, were to commit a crime inducing mutilation or death, and the uſurper then reſtore him to his proper owner; and the ſlave then ſuffer death or mutilation; for in that caſe the uſurper would be reſponſible for the *whole* of the value to the owner; in the ſame manner as he would have been in caſe of the ſlave's having been put to death whilſt in his own poſſeſſion; as the cauſe, in either inſtance, occurred with him. With reſpect to the caſe of pregnancy, adduced by the two diſciples, it is not admitted by *Haneefa*. If, however, it were admitted, ſtill there is no analogy between it and the caſe in queſtion, ſince pregnancy is the cauſe of *delivery*, and not of *death*, except in a few inſtances.

IF a ſlave firſt commit theft with the ſeller, and then, after being ſold, commit theft with the purchaſer, and afterwards ſuffer amputation for both thefts, in that caſe, according to the two diſciples, the purchaſer is entitled to the difference of relative value of the ſlave at the time of ſale, and after the commiſſion of the ſecond theft. According to *Haneefa*, on the other hand, the purchaſer is not entitled to return him, unleſs the ſeller ſhould of his own accord conſent to receive him: but he is entitled to a compenſation for the fourth of his value; and if the ſeller ſhould himſelf agree to receive him, in that caſe he muſt reſtore to the purchaſer three fourths of his price; becauſe the *hand* of a man is eſteemed equal to half his perſon; and as, in this caſe, the hand is forfeited for the commiſſion of *two* thefts, it follows that a deduction of one quarter ought to be made on account of the theft committed whilſt in the poſſeſſion of the *purchaſer*.

Caſe of a ſlave ſuffering amputation for *two* thefts, one committed with the *ſeller*, and the other with the *purchaſer*.

IF a ſlave, having been ſeverally ſold, and delivered to three different perſons, ſhould then ſuffer amputation for a theft which he had committed whilſt in the poſſeſſion of the firſt ſeller, and of which the different purchaſers were not apprized at the period of concluding their

Caſe of a ſlave after being *thrice* ſold, ſuffering amputation for a theft committed with the *firſt ſeller.*

their reſpective contracts,—in that caſe, according to *Haneefa*, the laſt purchaſer has a right to return him for a full retribution of the price to the perſon from whom he bought him; and he again is entitled to return him, on the ſame condition, to the perſon from whom he bought him; and in this manner the return may be made through the different gradations of purchaſers to their immediate ſellers, until at length the ſlave be returned to the ſeller in whoſe hands he committed the theft;—in the ſame manner as in a caſe of *claim of right*; for the exiſtence of a *cauſe* of amputation is (according to *Haneefa*) equivalent to a *claim of right*, as was before explained *. According to the two diſciples, on the other hand, the laſt purchaſer is entitled to a compenſation from the *immediate ſeller*; but *he* again is not entitled to any compenſation from *his* immediate ſeller; in the ſame manner as in a caſe of *defect*; for the exiſtence of a *cauſe* of amputation is (according to *them*) equivalent to a *defect*, as was before explained *.—(It is to be obſerved that the mention of the purchaſer being ignorant of the theft committed by the ſlave, is inſiſted on in the two preceding examples, on account of the particular tenets of the two diſciples; for as, in their opinion, the exiſtence of a *cauſe* of mutilation is equivalent to a *defect*, it follows that if the purchaſer had previous knowledge of the exiſtence of ſuch cauſe, he would appear to have acquieſced in the defect, and conſequently have relinquiſhed any right to a compenſation. As *Haneefa*, on the contrary, holds the exiſtence of a *cauſe* of mutilation to be equivalent to a *claim of right*; and as the knowledge or ignorance of this circumſtance makes no difference with reſpect to the purchaſer, it follows that ſuch ſpecification, with regard to *his* tenets, is perfectly immaterial.)

Where the ller an *exemption from*

If a perſon ſhould ſell a ſlave, ſtipulating an exemption to himſelf of all reſponſibility for his defects, as if he ſhould ſay, "I have ſold ſlave with all his defects,"—in that caſe, if the purchaſer acquieſce in ſuch condition, and exempt him from any reſponſibility, he is not afterwards permitted to return him to the ſeller on account of any defect, notwithſtanding the condition of the ſeller may have been *general*, that is, without ſpecifying the particular names of the defects from the reſponſibility of which he exempted himſelf.—*Shafeï* is of opinion that ſuch exemption is not valid, unleſs the name of every defect to which it refers be ſpecified;—for it is a rule, with him, that exemption from undefined claims is invalid; becauſe *exemption* has ſome of the properties of *inveſtiture*, (whence it is that it may be rejected,) and inveſtiture of an undefined nature is invalid. The argument of our doctors is that the grant of ſuch exemption is in fact a voluntary ſurrender of one's own right, the uncertainty with reſpect to which can be no cauſe of contention, ſince delivery is not requiſite. It is to be obſerved that *Aboo Yooſaf* is of opinion that the exemption, in this caſe, includes all defects actually exiſting at the time of ſale, and alſo all which may happen in the interval between that and their delivery. *Mohammed* and *Ziffer*, on the contrary, are of opinion that the defect which may happen in the interval ought not to be included. The argument of *Aboo Yooſaf* is that the probable object of ſuch ſurrender on the part of the purchaſer is to render the ſale *binding* and *concluſive*, which would not be the caſe unleſs the defects that may happen in the interval between the ſale and the ſeizin were alſo included.

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* See p. 224.

wards return
the article,
whatever the

CHAP. V.

Of Invalid, Null, and * Abominable *Sales.*

A SALE *is* INVALID *where it is lawful with reſpect of its* ESSENCE, *but not with reſpect of its* QUALITY; *and* NULL, *where the ſubject is not of an appreciable nature*; *and the terms* INVALID *and* NULL, *are often indiſcriminately uſed.—An* ABOMINABLE *ſale is ſuch as is lawful both in its* ESSENCE *and* QUALITY, *but attended with ſome circumſtance of* ABOMINATION.

Diſtinctions between a *null* and an *invalid* ſale.

A SALE in exchange for *carrion*, *blood*, or the perſon of is *null*, becauſe none of theſe caſes bears the characteriſtic of *ſale*, (namely, an *exchange of property for property*,) ſince theſe articles do not conſtitute property with any perſon. A ſale in exchange for *wine* or *pork* (on the other hand,) is merely *invalid*; becauſe the characteriſtic of ſale does exiſt in theſe inſtances, as theſe articles are conſidered as property with ſome deſcriptions of people, ſuch as *Chriſtians* and *Jews*; but they do not conſtitute property with *Muſſulmans*, and a contract comprehending theſe articles is therefore invalid.

The property purchaſed under a *null*

IN a ſale that is *null*, the purchaſer is not empowered to perform any act with reſpect to the ſubject of the ſale, but it remains as a truſt in his hands, according to ſome of our modern doctors; becauſe, as the *contract* of ſale, in ſuch an inſtance, is totally diſregarded, there remains only the ſeizin of the *purchaſer* with the conſent of the *ſeller*: and accordingly, if the article were to periſh in the purchaſer's hands, in this inſtance, he is not reſponſible for it. Others are of opinion that the ſubject of the ſale, in this caſe, is not a *depoſit*, but that the purchaſer is not reſponſible for it;—(in other words, if it periſh in the purchaſer's hands, he is anſwerable;)—becauſe the article is as much in his poſſeſſion, in this inſtance, as an article detained in a perſon's hands with an *intention* of purchaſe, and for which he is reſponſible. Some allege that *Haneefa* is of the *firſt* opinion, and the two diſciples of the *ſecond*. The reaſons for this difference of doctrine will be explained in treating of the deceaſe of an *Am Walid* or *Modabbir*, in the hands of a purchaſer.

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* The word in the original is *Makrooh*, which the tranſlator (following its literal and common acceptation) has rendered *abominable*. The term, however, in this work, is not to be underſtood in the ill ſenſe in which it is generally employed in the Engliſh language; the caſes to which it relates being ſuch as are in every reſpect legal, but which being attended with circumſtances of impropriety, an abſtinence from them is recommended.

ſale is merely a *truſt* in the purchaſer's hands:

IN a caſe of *invalid* ſale, the purchaſer becomes proprietor of the article upon taking poſſeſſion of it; and is reſponſible for it [if it be loſt in his hands.] *Shafeï* is of a different opinion, as will be hereafter explained.

but that chaſ [illegible] an ſale *his property*.

THE ſale of carrion, blood, or the perſon of a freeman, is null, in the ſame manner as a ſale *in return* for thoſe articles is null; becauſe, as thoſe articles do not conſtitute property, they are unſaleable.

A SALE of wine or pork, if in return for *money*, is *null*; and if in return for any other article, (as *cloth*, for inſtance,) it is *invalid*;—whence it is that the ſeller of pork or wine, for *cloth*, becomes the proprietor of ſuch cloth, although the actual pork or wine do not become the property of the purchaſer. The diſtinction in theſe caſes is, that wine and pork are held by *Zimmees* to be property, whereas *Muſſulmans* conſider them as articles from which no uſe can be de-
becauſe the LAW has commanded the contempt of them, and

A ſale of *forbidden* things, if for *money*, [illegible] prohibited all regard to them among *Muſſulmans.* Now, a *Muſſulman*'s purchaſing either of theſe for ſpecie implies a regard to them, becauſe it is not *money* (which conſtitutes the price) that is the object of the ſale, as *it* is merely the inſtrument of *acquiring* the object; for in fact it is only the *wine* or *pork* that is the object; and as theſe articles are not appreciable with reſpect to *Muſſulmans*, it follows that the ſale of them is *null.* It is otherwiſe if a *Muſſulman* purchaſe cloth for pork or wine, becauſe that can admit of no other conſtruction than that he regards the *cloth* as the object of the tranſaction, conſidering the pork or the wine only as the means of attaining ſuch object, and not (as in the other caſe) as the object itſelf. The ſpecification of the pork or wine, therefore, is regarded merely that the purchaſer may become the proprietor of the *cloth*, and not in order that the ſeller may become proprietor of the wine or pork; and hence the mention of thoſe articles is invalid, and the payment of the *price of the cloth*, and not the delivery of the *fleſh* or *liquor*, is incumbent on the purchaſer;—(and ſo alſo, where a perſon *ſells* wine or pork for cloth;) for, as cloth is a ſaleable article, the *cloth* muſt, in this inſtance, be conſidered as the ſubject of the ſale; for which reaſon this is an *invalid* and not a *null* ſale; becauſe where, in a contract of ſale, the ſubject on both ſides conſiſts of ſomething elſe than *money*, either may with equal propriety be conſidered as the ſubject of the ſale. (This ſpecies of ſale is termed a ***Beeya Mookâyeza***, or *barter.*)

The ſale of a a *Mokâtib* is null;

THE ſale of an *Am-Wâlid*, a *Modabbir*, or *Mokâtib*, is null;—becauſe an *Am-Walid* has a claim to freedom, as the prophet has ſaid, "*Her child hath ſet her free*,*" (that is, her child is a *cauſe* of freedom to her;)—and the cauſe of freedom, with reſpect to a *Modabbir*, is not eſtabliſhed *upon the deceaſe of his owner*, but muſt be conſidered as actually extant in him *at preſent*, as the owner is incapable of emancipating him *after his deceaſe*;—and a *Mokâtib*, on the other hand, is poſſeſſed of his own perſon as a right eſtabliſhed in him, and binding upon his owner, inſomuch that the owner cannot of himſelf break or infringe upon it:—if, therefore, the ſale of any of theſe were valid, that which is eſtabliſhed in them would be rendered null;—hence the ſale of them is null.—Reſpecting a caſe where a *Mokâtib* himſelf acquieſces in being ſold, there are two opinions recorded. According to the *Zahir Rawâyet*, the ſale in ſuch caſe is valid. It is to be obſerved that by a *Modabbir* is here meant ſuch as is *abſolutely* ſo, and not one whoſe condition of freedom is reſtricted to the non-recovery of his maſter from the illneſs under which he laboured at the time of granting the *tadbeer* *.

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* See Vol. I. p. 479.

and the purchaſer is not reſponſible if they die in his hands.

If, after the ſale of an *Am-Walid* or *Modabbir*, and the ſeizin of the purchaſer, one or other ſhould die, in this caſe, according to *Haneefa*, the purchaſer is not reſponſible †. According to the two diſciples he is reſponſible for the value:—(and there is one tradition which reports that *Haneefa* coincides with them on this point.)—The reaſoning of the two diſciples is, that as the purchaſer took poſſeſſion of the *Modabbir* or *Am-Walid* in virtue of a *ſale*, he is therefore reſponſible for the loſs; in the ſame manner as for the loſs of any other property after purchaſe and ſeizin;—for this reaſon, that an *Am-Walid* or *Modabbir* may be included ‡ in a contract of ſale; whence it is that any article united with them in a contract of ſale becomes the actual property of the purchaſer. It is otherwiſe with reſpect to a *Mokâtib*, as the purchaſer is not reſponſible for the loſs of him, becauſe, being poſſeſſed of his own perſon, the purchaſer's ſeizin of him is not fully eſtabliſhed; and the reſponſibility attaches in virtue of the ſeizin. The argument of *Haneefa* is, that *actual ſale* cannot operate with reſpect to what is not in reality a fit ſubject of it;

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* See Vol. I. p. 477.

† That is, the loſs is conſidered as falling upon the *ſeller*, and not upon the *purchaſer*.

‡ That is, "*may be joined with other articles.*"

and as a *Modabbir* or *Am-Walid* are not in reality fit ſubjects of ſale, they are therefore conſidered in the ſame light with a *Mokâtib*. In reply to what the two diſciples urge it may be obſerved, that an *Am-Walid* or *Modabbir* are *not* included in a ſale for the ſake of *their perſons*, but only in order that the effect of ſale may be eſtabliſhed with reſpect to ſuch articles as may have been united with them in the contract; in the ſame manner as where property of the *purchaſer* happens to be involved in the contract;—in other words, if a perſon purchaſe two ſlaves by one contract, and one of thoſe ſlaves happen to be his property, ſuch ſlave is nevertheleſs included in the contract,—not indeed for the ſake of *his perſon*, but merely in order that the effect of the ſale may extend to the *other* ſlave, who is united with him in it.

The ſale is null of fiſh, in the water,

THE ſale of fiſh which is not yet caught is null, as it is not in that ſtate property.—In the ſame manner alſo, the ſale of a fiſh which the vender may have caught, and afterwards thrown into a large fountain from which it cannot be taken without difficulty, is null, becauſe there the delivery is impracticable. (It is lawful, however, in caſe the fountain be ſo ſmall as to admit its being caught with eaſe.)—If fiſh ſhould of themſelves come into a fountain without the proprietor's having taken any means, by the erection of a dam, or the like, to prevent their egreſs, they are not conſidered as property, and the ſale of them is therefore null.

or of a bird in the air,

THE ſale of a bird in the air, or of one which after having been caught is again ſet at liberty, is null; becauſe in the one caſe it is not property, and in the other the delivery is rendered impracticable.

or of a fœtus in the womb, (or its offſpring,)

THE ſale of a *fœtus* in the womb, or of the offſpring of that *fœtus*, is null; becauſe the prophet has prohibited it; and alſo, becauſe there is a probability of fraud, from there being a want of certainty in the caſe.

or of milk in the udder,

The ſale of milk in the udder is null; becauſe there is a poſſibility of fraud, in the udder's being perhaps void of milk, and full of wind; or, becauſe there might ariſe a contention with reſpect to the mode of extracting the milk; or becauſe it might happen that the udder contained more milk at the time of extracting it than at the time of ſale; and hence there might be implicated in the ſale ſomething not properly the ſubject of it.

or of hair (or wool) upon an animal.

The ſale of wool or hair growing upon an animal is null; becauſe, whilſt joined to the animal, it is conſidered as a conſtituent part of it; and alſo, becauſe it cannot be exactly cut away from the animal, without either leaving a part of it or taking away part of the ſkin, ſince it is not practicable to *pull* it out. It is, moreover, recorded in the *Nakl Saheeh*, that "the prophet prohibited the ſale of "wool upon the animal, of milk in the udder, and of butter in the "milk*." It is recorded of *Aboo Yooſaf*, that he admitted the legality of the ſale of growing wool: but to this the above tradition is an anſwer.

The ſale is invalid, of any article [illegible] from its ſituation without injury,

It is not lawful † to ſell a piece of wood ſuſtaining a weight, ſuch as a *pillar* or a *beam*, although the piece of wood be ſpecified and determinate. Neither is it lawful to ſell a yard from a piece of cloth which is ſewed, whether the parties ſpecify that the yard ſhall be cut off from it or not; becauſe in this caſe a delivery without injury is impracticable. It is otherwiſe where a perſon agrees to ſell *ten drams* (for inſtance,) from an ingot of ſilver, for theſe may be cut off from the ingot without injury to it. It is to be obſerved, however, that if the ſeller, before the diſſolution of the contract, ſhould cut off the or of which the quality or n.

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* That is, before it has been extracted by *churning*.

† By the phraſe "*it is not lawful*" is here (and in the following examples) to be underſtood, "it is *invalid*."

yard of cloth, or pull away and ſeparate the piece of wood, the ſale in that caſe becomes complete, ſince the cauſe of its invalidity is removed. It is otherwiſe with reſpect to the ſale of the

becauſe that continues null, although the ſtones be afterwards opened and the kernels taken out; ſince (contrary to the caſe of the *yard of cloth*, or the *piece of wood*) the exiſtence of them was *originally* uncertain.

It is not lawful for a game-catcher to ſell "*what he may catch at one pull of his net*;" becauſe the ſubject of the ſale is uncertain; and alſo becauſe the purchaſer may be deceived, as it is poſſible that none may be caught.

or the quantity of which can only be judged of by conjecture,

It is not lawful to ſell dates growing upon a tree in exchange for dates which have been plucked, and which are computed, from conjecture, to be equal in point of meaſurement to thoſe that are upon the tree. This ſpecies of ſale is termed *Mozábinat**; and has been prohibited by the prophet, as well as the ſale termed *Mohákila*, which is the ſale of wheat in the ear, in exchange for a like quantity of wheat by conjecture. The law is the ſame with reſpect to the ſale of grapes on the vine in exchange for raiſins. *Shafeï* holds theſe ſales to be lawful, provided they be not extended to a quantity exceeding five *Wuſks*†; becauſe, although the prophet has prohibited a ſale by *Mozábinat*, yet he has permitted what is termed *Oráya*; which he explains to be a ſale of dates upon a tree, provided the quantity be leſs than five *Wuſks*, in exchange for a quantity which have been plucked, and which are ſimilar, in point of meaſurement, according to computation. Our doctors, on the other hand, explain *Oráya* in its literal ſenſe to mean a *gift*; and the nature of it is this. A perſon makes a gift of the dates of his orchard to another, who thereupon comes and enters the orchard. This gives diſguſt to the proprietor, as his family reſide in the orchard; but being, at the ſame time, unwilling to violate his agreement, he prohibits the other from entering into the orchard, and gives him a quantity of dates which have been pulled in exchange for thoſe which were growing in the orchard. This is the proper interpretation of the traditional ſaying of the prophet, quoted by *Shafeï*; and this mode of ſale, which is termed *Mooȷȧr*, is valid in the opinion of our doctors. It is not, however, in reality a *ſale*, becauſe the right of property had not veſted in the donee, on account of his not having made ſeizin of the dates, and therefore the dry dates which were afterwards given to him is conſidered as a *new gift*.

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* Properly, a ſale *without weight or meaſure*.

† *Wuſk* literally means a camel's burthen, which is computed to be ſixty *ſaás*. (See Vol. I. p. 44.)

or where the bargain is determined by the purchaſer *touching* the goods, &c.

It is not lawful to ſell goods by the way of *Molámiſa*, *Monâzibee*, or *Alka Hidgir*;—that is, the *touch* of the goods, the *throwing* of the goods; or the *caſting of a ſtone*;—as where, for inſtance, a perſon having exhibited his goods to another, and ſpecified the price, the parties agree between themſelves that the contract ſhall be binding, either on the purchaſer's *touching* the goods, or the ſeller's *throwing* them towards him, or the purchaſer's *caſting a ſtone* at them. Theſe modes of ſale were common in the days of ignorance: but were inhibited by the prophet.

The ſale is invalid, of graſs upon a common,

It is not lawful to ſell graſs growing on a common, becauſe it is not the property of the ſeller; for it is declared in the traditions that "in *graſs* all men are alike ſharers;"—(that is, it is *common* to all.) Neither is it lawful to let it out on leaſe; becauſe, as it is not permitted to farm any thing, where the object is the deſtruction of it, even though it be the property of the leſſer, it is conſequently in a ſuperior degree unlawful to let in leaſe an article of which the property is common to all, where the object of the leſſee is the deſtruction of it *.

or of bees (unleſs in a *hive*, or with the comb,)

The ſale of bees is not lawful according to the two *Elders*. *Mohammed* is of opinion that it is lawful, provided the bees be in a place of cuſtody †, and not wild ‡; and ſuch is alſo the opinion of *Shafei*; becauſe a bee is an animal yielding good; and as we are permitted by the LAW to enjoy the good which that creature yields, it follows that the *ſale* of the animal is permitted. The reaſoning of the two *Elders* is that, the animal being of an offenſive nature, the ſale of it is therefore unlawful, in the ſame manner as in the caſe of *waſps*. Beſides, the good is derived from its *produce*, not from its *ſubſtance*, whence no advantage can be derived from it until the honey be produced. If, however, the *comb* be ſold, with the honey in it, and the bees, the ſale of the bees is in this caſe lawful, as a *dependant*. *Koorokhee* is alſo of this opinion.

or of ſilk-worms.

It is not lawful to ſell *ſilk-worms*, according to *Haneefa*, as they are animals of an offenſive nature. *Aboo Yooſaf* thinks that if the ſilk have appeared they may then lawfully be ſold, as a *dependant*. *Mohammed* is of opinion that the ſale of them is lawful in any caſe, as being an animal whence an advantage is derived. *Haneefa* is of opinion alſo, that the ſale of their eggs is unlawful. The two diſciples, on the contrary, are of opinion that ſuch ſale is lawful of neceſſity.

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* The object of a leaſe is *uſufruct*, or (in the language of the *Muſſulman* lawyers) *a deſtruction of the produce of the thing, but not of the thing itſelf:* thus if a perſon ſhould take a leaſe of a piece of ground, or a fruit tree, he would be entitled to appropriate to himſelf the produce of the ground, whether grain or graſs, or the fruit that might grow upon the tree; but he would have no right to uſe the ground or the tree (the immediate ſubjects of the leaſe) ſo as to occaſion any deſtruction of their ſubſtance. Hence proceeds the illegality of a leaſe of a field of graſs, of grain, of the fruit of a tree or the like; for the leaſe in any of theſe caſes, would be entirely uſeleſs, ſince the leſſee, being entitled only to the uſe of the *produce* of the ſubject of the leaſe, would not be entitled to the uſe of any of theſe which are themſelves the immediate ſubject of the leaſe.

† Such as a *hive*, or *bee-houſe*.

‡ Literally, "*not in the air.*"

THE ſale of *pigeons*, of which the number is aſcertained, and the delivery practicable, is lawful, as in ſuch circumſtances they conſtitute property.

The ſale of tame pigeons is valid.

IT is not lawful to ſell an abſconded ſlave, becauſe the prophet has prohibited this; and alſo, becauſe the delivery is impracticable. If, however, the purchaſer ſhould declare that "the fugitive is in "his poſſeſſion," the ſale is lawful, becauſe the obſtacle on which the prohibition is founded is in this caſe removed.—It is to be obſerved that if the purchaſer, in this inſtance, ſhould have declared, before witneſſes, that "he had taken poſſeſſion of this ſlave with intent to "reſtore him to his owner," he is not held, on the concluſion of the contract, to become ſeized of him in virtue thereof; becauſe the former ſeizin, being in the nature of a *truſt*, cannot ſtand in the room of that made on account of *purchaſe*. If, on the other hand, he ſhould have made no ſuch declaration, in that caſe he is held to be ſeized of the ſlave, in virtue of the ſale, immediately on the concluſion of the contract; becauſe the former ſeizin, being in the nature of an *uſurpation*, may therefore ſtand in the room of a ſeizin for ſale; for both are the ſame in effect, as they both equally induce reſponſibility. If the ſlave ſhould have eloped to ſome other perſon, and the purchaſer ſay to the proprietor "ſell me your ſlave who has run "away to ſuch an one," and the ſeller accordingly agree, the ſale is in that caſe alſo unlawful, becauſe of the impracticability of the delivery.

ſlave is in-

IF a perſon, having ſold a fugitive ſlave, ſhould after the ſale recover him, and deliver him to the purchaſer, the ſale is nevertheleſs unlawful,

although the ſeller ſhould afterwards recover and deliver him to the purchaſer.

unlawful, becauſe it was originally null, in the ſame manner as if it had related to a *bird in the air.* It is recorded, as an opinion of *Haneefa*, that the ſale in this caſe is valid, provided it was not undone previous to the delivery, becauſe it was founded on property, and there was no bar to its effect except the impracticability of the delivery, which is removed by the recovery of the ſlave; (and ſuch is alſo related as the opinion of *Mohammed*;)—in the ſame manner as if a ſlave, after having been ſold, ſhould run away previous to the ſeizin of the purchaſer, in which caſe, if the ſeller ſhould afterwards recover him, and deliver him to the purchaſer, the ſale is binding, provided it was not diſſolved in the interval.

The ſale is invalid, of a woman's milk,

THE ſale of a woman's milk is unlawful, although it be in a *veſſel.* *Shafeï* is of opinion that if it be in a veſſel the ſale of it is lawful, becauſe it is a pure beverage. The argument of our doctors is that, as being part of a human creature, it ought to be reſpected; and the expoſure of it to ſale is an act of diſreſpect. In the *Zahir-Rawâyet* there is a diſtinction between the milk of a *female ſlave* and a *free woman.* It is related, as an opinion of *Aboo Yooſaf*, that the ſale of the milk of a *female ſlave* is lawful, becauſe the ſale of the *ſlave herſelf* is lawful. The anſwer to this is that the ſale of the female is legal, becauſe of the bondage, which is a quality of her perſon; but ſuch quality does not relate to the *milk*; the one being *alive*, and the other *dead.*

or the briſtles of a hog,

THE ſale of the briſtles of a hog is unlawful, becauſe the animal is eſſentially filth, and becauſe the expoſure of this article to ſale is a degree of *reſpect*, which is reprobated and forbidden. It is lawful, however, to apply it to uſe, ſuch as ſtitching leather, for inſtance, in the room of a needle, as this is warranted by neceſſity.

OBJECTION.—It would appear that the *ſale* of it is warranted from neceſſity, in the ſame manner as the *uſe* of it.

REPLY.—There is no neceſſity for the ſale of it, ſince any quantity of it may be had *gratuitouſly* and *without purchaſe.*—It is to be obſerved that hogs' briſtles falling into a little water * renders it impure, according to *Aboo Yooſaf.*—*Mohammed* is of a different opinion, becauſe the legality of the uſe of the article in queſtion, is (according to him) an argument of its purity. *Aboo Yooſaf*, on the other hand, argues that the legality of the uſe of it is founded on *neceſſity*, and not on its *purity*; and there exiſts no neceſſity in the caſe of its falling into water.

or human hair,

THE ſale of human hair is unlawful, in the ſame manner as is the *uſe* of it; becauſe, being a part of the human body, it is neceſſary to preſerve it from the diſgrace to which an expoſure of it to ſale neceſſarily ſubjects it. It is moreover recorded, in the *Hadees-Shareef*, that "GOD denounced a curſe upon a *Wâſila* and a *Mooſtwâſila.*"—(The *firſt* of theſe is a woman whoſe employment it is to unite the ſhorn hair of one woman to the head of another, to make her hair appear long; and the *ſecond* means the woman to whoſe head ſuch hair is united.) Beſides, as it has been allowed to women to increaſe their locks by means of the wool of a camel, it may thence be inferred that the uſe of human hair is unlawful.

THE ſale of the hides of animals is not lawful until they be dreſſed, becauſe the uſe of them, until then, is prohibited in the traditions of the prophet. It is lawful, however, to ſell dreſſed hides.

but ſubſt all deſcriptions (excepting thoſe of men or hogs)

IT is permitted either to ſell or apply to uſe the bones, ſinews, wool, horns, or hair, of all animals which are dead, excepting thoſe of *men* and *hogs*. The reaſon of this is that theſe articles are *pure*, and are not conſidered as *carrion:* beſides, death does not affect them as it

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* By a *little* water (ſay the commentators) is here meant ſuch a quantity as may be contained in a *cup* or other veſſel.

does

may be either ſold or converted to uſe.

does the *animal*, as theſe articles are not poſſeſſed of life.—It is to be obſerved that *Mohammed*, conſidering an elephant as *eſſential filth*, like a hog, holds the ſale of it to be unlawful:—but the two diſciples, conſidering it in the nature of a *wild* animal, regard the ſale of it, or of the *bones* of it, as lawful.

A *right* cannot be ſold, unleſs it involve *property*.

If in a houſe, of which the upper and under apartments belong to different perſons, the whole, or the *upper ſtory* only, ſhould fall down, in that caſe the proprietor of the *upper* ſtory is not permitted to ſell his right, (namely, the right of building another *upper* ſtory,) becauſe this, as being only a *right*, is not *property*.

Objection.—It would hence appear that the ſale of *a right to water* * (that is, of a ſhare in water uſed in tillage) is not lawful, as it is not the ſeller's *property*, but merely his *right*; whereas ſuch a ſale is allowed, if made along with the *land*, according to all authorities; and according to one tradition (which has been adopted by the *Sheikhs* of *Balkh*) the ſale of the right to water *by itſelf* is lawful.

Reply.—The ſale of a *right to water* is valid, becauſe the term *Shirb* means *a ſhare in water*; and that is an exiſtent article, and in the nature of property;—whence it is that if a perſon, in a caſe where it is enjoyed by rotation, ſhould deſtroy it during the term of his right, he is reſponſible for the value of it;—and alſo, that, when it is ſold along with the ground, a part of the price is oppoſed to the *right to water*.

Any thing may be ſold which admits of a *preciſe*

If a perſon beſtow or ſell a road † it is lawful: but neither the ſale nor the gift of a *water-courſe* is valid. Theſe caſes admit of two ſuppoſitions.—I. The ſale may be of the *abſolute right* to the road or

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* Arab. *Shirb.*—This term properly ſignifies *draw-wells* dug for the purpoſe of watering lands, and the right to the uſe of which is transferable, in the ſame manner as any other property.

† By a *road* is here meant a lane or narrow paſſage leading into a ſtreet or high-road.

water-courſe,

aſcertainment: but not otherwiſe.

water-courſe, without defining the length or breadth of either.—II. It may be of the right of paſſing upon the road, or receiving the benefit of the water ‡.—Upon the *firſt* ſuppoſition, the difference between the two caſes is that the road is certain and aſcertained, becauſe the known breadth of it is equal to that of a *door-way*:—but in the caſe of a water-courſe there is an uncertainty, becauſe it is not known how much ground the water covers.—Upon the *ſecond* ſuppoſition, there are two traditions with reſpect to a ſale of a right of paſſage on the road:—according to one tradition the ſale is lawful; and according to another it is invalid.—The difference between the ſale of a right of paſſage on the road, and a right of benefit from the water, (as inferred from the firſt tradition,) is that a right of *paſſage* is a point which admits of being preciſely aſcertained, as it is connected with a known object, namely, the *road*; whereas the right of *benefit from the water* is of a nature which cannot admit of being preciſely aſcertained,—and this, whether the water be conveyed in a trough ſupported upon a wooden frame, or in a trench cut in the ground.

A deception with reſpect to the *ſex* invalidates the ſale in *ſlaves*, but not in *brutes*.

IF a perſon ſell a ſlave as a *female*, who afterwards proves to be a *male*, in that caſe the ſale is utterly null.—It is otherwiſe where a perſon ſells a *goat* (for inſtance) as a *male*, and it afterwards proves to be a *female*; for in that caſe the contract of ſale is complete: the purchaſer, however, has the option of keeping the animal, or rejecting it. The difference between theſe two caſes is founded on this general rule,—that wherever *denomination* and *pointed reference* are united, by the ſeller pointing to the ſubject of the ſale, and mentioning its *name*, (as if a perſon ſhould ſay " I have ſold this *goat*, for inſtance,)—in this caſe, if the article referred to prove eſſentially different from what was mentioned, the ſale is ſuppoſed to relate to the *article named*; and therefore if the article referred to prove of a *different ſpecies* from what was named, the ſale is null.—If, on the other hand, the article referred to prove of the *ſame ſpecies* with the article named, but of a different quality, in this caſe the ſale relates to the *article referred to*; and where the article referred to is found, the ſale is complete: the purchaſer, however, has in this inſtance an option, becauſe of the *quality* mentioned not exiſting in the article;—as where, for inſtance, a perſon ſells a ſlave as a *baker*, and he proves to be a *ſcribe*.—Now it is to be obſerved that a male and a female ſlave are not of *the ſame*, but of *two different* ſexes, which is accounted, in this inſtance, as equivalent to being of different ſpecies, becauſe of their different uſes; whereas in *goats* the object for purchaſe (namely, *to eat their fleſh*,) is the ſame, with reſpect both to the *male* and the *female*, and therefore they are not held to be of two different ſpecies.—It is proper to remark, in this place, that, amongſt lawyers, the unity or difference of the *object*, and not the unity or difference of the *eſſence*, determines the unity or difference of the *ſpecies*. Thus *vinegar* of the grape is held to be of a different ſpecies from the *ſweet juice* of the grape.

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* Literally, *cauſing the water to run*, (by opening a ſluice, or ſo forth.)

A re-ſale to the ſeller, for a ſum ſhort of the original price, before payment of [illegible] is

If a perſon purchaſe a female ſlave for a thouſand *dirms*, ſtipulating either a *future* or *immediate* payment, and having taken poſſeſſion of her, ſhould ſell her to the perſon from whom he had purchaſed her, for five hundred *dirms*, previous to his having made payment of the thouſand *dirms*, this ſecond ſale is invalid. *Shafeï* is of opinion that as the right of property in the ſlave had veſted in the purchaſer, becauſe of his having taken poſſeſſion of her, ſuch ſale, on the part of the purchaſer to the ſeller, is valid, in the ſame manner as it would have been valid to any other perſon,—or as it would have been valid to the ſeller in caſe the ſecond price had been equal to or greater than the firſt,—or in caſe it had been in exchange for other goods, although theſe ſhould have been of a leſs value.—The arguments of our doctors are,—First, a tradition that *Ayeeſha*, having heard of a woman who, having purchaſed a female ſlave from *Zeyd Bin Râkim* for eight hundred *dirms*, had afterwards ſold her to the ſaid *Zeyd* for ſix hundred *dirms*, ſpoke to her thus; "*This purchaſe and ſale on your part is bad; in-*"*form Zeyd, that certainly* GOD *will render null his pilgrimages* "*and enterpriſes achieved along with the prophet unleſs he repent of ſuch* "*conduct.*"—SECONDLY, if the ſale in queſtion be valid, it follows that the firſt ſeller remains indebted to the purchaſer for *five hundred* DIRMS, and the purchaſer to him for *one thouſand* DIRMS. Now if their account ſhould be balanced, and five hundred *dirms* be ſtruck off from the debt of the purchaſer, in liquidation of his claim upon the ſeller, there remains five hundred due by the purchaſer, for which he has received no return, and this is unlawful. It is otherwiſe where the ſeller, in the ſecond ſale, gives the purchaſer goods in return; becauſe there the difference is not obvious; being apparent only with reſpect to articles of *the ſame kind.*

but the contract is not invalid with

which may be joined to the original

IF a perſon, having purchaſed a female ſlave for *five hundred* DIRMS, and taken poſſeſſion of her, ſhould afterwards, before he had diſcharged the price, ſell her, in conjunction with another, for *five hundred* DIRMS, to the perſon from whom he had purchaſed her, in that caſe the ſale is valid with reſpect to the female ſlave whom he had not formerly purchaſed from that perſon, but null with reſpect to the other. The reaſon of this is that, as a part of the price is neceſſarily oppoſed to the *new* ſlave, it follows that he purchaſes a ſlave, and ſells her again to the ſame perſon for a leſs price than he had purchaſed her for, which is not lawful, as has been already ſhewn.—No ſuch reaſon of illegality, however, exiſting with regard to the ſale of the *other* ſlave, it is therefore valid, in a price proportioned to her value.

OBJECTION.—It would appear that the ſale of the *other* ſlave is alſo invalid, becauſe the perſon has ſold both by one contract, and as the ſale of the *one* is invalid, it would follow that the ſale of the *other* is alſo invalid, (according to the tenets of *Haneefa*,) in the ſame manner as where a freeman and a ſlave are ſold by one contract, the ſale of the *ſlave* being in that caſe invalid as well as that of the *freeman*.

Reply.—The ſale of the other ſlave is valid; and the invalidity of ſale with reſpect to *one* does not affect the ſale of the *other*; becauſe the *invalidity*, in this inſtance, is *weak*, as there is a difference of opinion regarding it amongſt our doctors; and alſo, becauſe it is founded on a ſuſpicion of *uſury*, the effect of which ſuſpicion cannot extend beyond the *ſubject* of ſuſpicion, namely, the firſt ſlave.

The ſtipula-

validates a ſale.

If a perſon purchaſe oil, on this condition, that it be weighed with the veſſel in which it is contained, and that a deduction of fifty *ratls* ſhall be made on account of the weight of the veſſel, ſuch ſale is not valid; whereas, if the condition be, in *general* terms, that "a "deduction ſhall be made for the weight of the veſſel," it is valid;—becauſe the *former* condition is not eſſential to the contract, whereas *latter* is eſſential.

Caſe of a dif-

of the which contained the commodity.

If a perſon, having purchaſed oil in a leathern bag, ſhould carry it away with him, and afterwards return a bag to the ſeller weighing ten *ratls*, and the ſeller aſſert that " this is not the bag he had car-" ried away with him, as that weighed only *five* ratls;" in this caſe the averment of the purchaſer is to be credited, whether the queſtion of diſagreement be conſidered as relating to the *bag* being different,—or to the conſequent difference it creates with reſpect to the quantity of oil; becauſe, if the difference be conſidered as relating to the *identity of the bag* of which the purchaſer had taken poſſeſſion, *his* aſſertion muſt be credited, ſince the word of the poſſeſſor is to be credited, whether he be *reſponſible* for the article (as in the caſe of an *uſurper*) or merely a *confident* (as in the caſe of a *truſtee*;)—or if, on the other hand, the difference be conſidered as relating to the *quantity of oil*, this reſolves itſelf into a difference with reſpect to the *amount of the* *price*, the ſeller claiming *more*, and the purchaſer acknowledging leſs: the purchaſer is therefore the defendant; and the aſſertion of a defendant, upon oath, muſt be credited.

may commiſſion a *Chriſtian* to his account; and ſuch ſale or purchaſe,

If a *Muſſulman* deſire a *Chriſtian* either to purchaſe or ſell wine or a hog on his account, and the *Chriſtian* act accordingly, in that caſe (according to *Haneefa*) ſuch ſale or purchaſe is valid: but an order of a *Muſſulman* to this effect being in the higheſt degree abominable, he is therefore enjoined (where it reſpects the *ſale* of thoſe articles) to devote the price obtained for them to the poor.—The two diſciples maintain that the purchaſe or ſale of wine or a hog by a *Chriſtian*, on account of a *Muſſulman*, is invalid; (and the ſame difference of opinion alſo obtains with reſpect to the caſe of a *Mohrim* appointing an agent for the ſale of the game he may have caught, when it became unlawful for him to make ſuch ſale.) The argument of the two diſciples is that the conſtituent, as not having himſelf the power of ſelling or purchaſing theſe articles, cannot of conſequence inveſt others with ſuch power;—beſides, as all the acts of an agent revert to the conſtituent on whoſe behalf they are performed, it is therefore the ſame as if the *Muſſulman* were *himſelf* to ſell or purchaſe theſe articles, which would be illegal. The argument of *Haneefa* is that the *contractor* (that is, the *purchaſer* or the *ſeller*) is, in this inſtance, no other than the *agent*;—for this reaſon, that *he* is fully empowered to perform theſe acts: the reverting, moreover, of the property to the conſtituent is a neceſſary and unavoidable effect, and therefore is not prevented by his *Iſlâm*;—in the ſame manner as the articles in queſtion may deſcend to a *Muſſulman* by *inheritance*;—(in other words, if a *Chriſtian*, whoſe heir is a *Muſſulman*, ſhould himſelf embrace the religion of *Iſlâm*, and afterwards die, before releaſing his hog, or converting his liquor into vinegar, in that caſe they would deſcend to his *Muſſulman* heir.)—It is to be obſerved, however, that although *Haneefa* admits the validity of the *purchaſe* of theſe articles by a *Chriſtian* agent, on behalf of a *Muſſulman*, ſtill he holds it incumbent on the *Muſſulman* to convert the liquor into *vinegar*, and to ſet free the hog.

A ſale is rendered invalid by the inſer-
vantageous to either party, or repugnant
contract; or which may occaſion contention, by involving an advantage to the *ſubject of the ſale*:

If a perſon ſell a male ſlave, on condition that the purchaſer ſhall emancipate him, or make him a *Modabbir*, or a *Mokâtib*,—or if a perſon ſell a *female* ſlave, on condition that the purchaſer ſhall make her an *Am-Walid*,—ſuch ſale is invalid; becauſe this is a *on a condition*;—and ſuch ſales are condemned by the prophet.—The in this particular, is founded on a tenet of our doctors, that the inſertion of any condition which is a neceſſary reſult of the contract (ſuch as where the ſeller bargains that "the purchaſer ſhall become "proprietor of the article ſold,") can no way affect the validity of the contract, ſince that would be eſtabliſhed independant of any ſtipulation;—and, on the other hand, that the inſertion of any condition which is not a neceſſary reſult of the contract, and in which there is an advantage either to the buyer or the ſeller,—or to the *ſubject* of the ſale, if capable of enjoying an advantage, (ſuch as where the ſeller bargains that "the purchaſer ſhall *emancipate* the ſlave he ſells to him,") renders the contract invalid; becauſe an additional and extraneous act is, in this inſtance, required from the purchaſer, without ſtipulating a recompence to him, and which of conſequence is of an uſurious nature;—and alſo, becauſe as there is an advantage in this condition to the *ſubject* of the ſale, who is capable of claiming it, it follows that a contention muſt neceſſarily enſue, and hence the object of ſale (namely, the prevention of ſtrife) is fruſtrated.—Conditions of this nature are therefore unlawful, excepting where cuſtom and precedent prevail over analogy; as where a perſon purchaſes unſewed ſhoes on condition of the ſeller's ſewing, or cauſing them to be ſewed for him. The inſertion, on the other hand, of any condition which is not a neceſſary reſult of the contract, and which, moreover, is not attended with advantage to any particular perſon, does not invalidate the contract.—An example of this occurs where a perſon ſells an animal, on condition that "the purchaſer ſhall *ſell it again*;" which condition is lawful, becauſe there is no particular perſon whoſe right it is to claim the performance of it, (ſince the *animal* is incapable of ſo doing,) and hence neither uſury nor ſtrife can attend ſuch a ſtipulation. Now, having explained the tenets of our doctors, it is proper to remark that the conditions recited in the caſes in queſtion are repugnant to the nature of the contract, as they tend to deprive the purchaſer of every right to which the ſale entitles him; and they alſo involve an advantage to the ſubject of the ſale, who is capable of claiming it:—they therefore invalidate the contract.—*Shafeï* diſſents from our doctors, as he holds the ſale of a ſlave, on condition of his emancipation, to be valid.

but ſuch ſale recovers its validity, by the purchaſer performing [illegible] ticle purchaſed:

IF a perſon ſhould emancipate a ſlave whom he had purchaſed on that condition, then the ſale, which, becauſe of ſuch condition, was previouſly illegal, becomes valid, according to *Haneefa*; and the purchaſer is reſponſible to the ſeller for the price. The two diſciples are of opinion that the emancipation does not render the ſale valid; and that therefore the payment of the *value*, and not of the *price*, is incumbent on the purchaſer; becauſe, as the ſale was originally invalid, in conſequence of the condition, it cannot afterwards be rendered valid by means of the emancipation, any more than by the purchaſer's *murdering* or *ſelling* the ſlave. The reaſoning of *Haneefa* is, that although the condition of emancipating the ſlave be not, *in itſelf*, agreeable to the requiſites of a contract of ſale, (as was before explained,) ſtill it is ſo *in effect*; becauſe it completes the right of property on the part of the purchaſer; and a thing becomes eſtabliſhed and confirmed by its completion; whence it is that the emancipation of a purchaſed ſlave is no bar to a right of compenſation from the ſeller in caſe of a defect.

Sale is renderedinvalid, by a reſerva-

IF a perſon ſell a *ſlave*, on condition that "he ſhall ſerve him for "the ſpace of two months after the ſale,"—or a *houſe*, on condition that "he ſhall reſide in it for the ſpace of two months after the *ſeller* from the article ſold;

" *ſale*,"—or, if a perſon ſell any other article, on condition of the purchaſer's lending him a *dirm* (for inſtance,) or making him ſome preſent,—the ſale ſo ſuſpended on any of theſe conditions is invalid: FIRST, becauſe theſe conditions are not agreeable to the nature of a ſale, and are attended with an advantage to the ſeller. SECONDLY, becauſe the prophet has prohibited a ſale on condition of a *loan*: and, THIRDLY, becauſe, if any diminution be made in the price, on account of the ſervices of the ſlave, or the reſidence in the houſe, it follows that a contract of *rent* is interwoven in that of *ſale*; or if, on the other hand, *no* diminution be made in the price on theſe accounts, it follows that a *deed of loan* is interwoven in the ſale; and both of theſe are illegal.

or, by the ſtipulation of a delay in the *delivery* of it;

IF a perſon ſell goods on condition of his being permitted to ſuſpend the delivery for a month, the ſale is in ſuch caſe invalid, becauſe a ſuſpenſion with reſpect to the delivery of goods which are extant and ſpecific is an unlawful condition. The reaſon of this is that a ſuſpenſion in point of time has been ordained by the LAW, merely for the purpoſe of *eaſe*, and is therefore only applicable to a *debt*, in order that the debtor may have time to collect the ſum within the preſcribed period and pay it accordingly;—but with reſpect to a thing actually extant, (ſuch as *cloth*, for inſtance,) there can be no occaſion for ſuch ſuſpenſion.

or, by the inſertion of an invalid condition,

THE ſale of a *pregnant* ſlave, with a reſervation of the *fœtus* in her womb, is invalid; becauſe it is a general rule that nothing, the ſale of which by *itſelf* is illegal, can be made an exception to a contract of ſale; and of this nature is a *fœtus*. The ſale, therefore, is invalid, becauſe of the invalidity of the condition. It is to be obſerved that a contract of *Kitâbat*, of *hire*, or of *pawnage*, are the ſame with a contract of ſale, in this reſpect, that an invalid condition is a means of invalidating the deed. In the caſe of *Kitâbat*, however, the invalid condition muſt actually exiſt in the deed; as when a perſon enters into covenant with his ſlave to emancipate him on condition of his giving him *wine*, or a *hog*. It is alſo to be obſerved that in the caſes of gift, alms, marriage, *Khoola*, and compoſition for wilful murder, the exception of the *fœtus* does not invalidate the deed; on the contrary, the deed takes place in full; but the *condition* is invalid. In the ſame manner, an exception of the *fœtus* does not invalidate a *legacy*, for in this caſe the exception is a valid condition.

or of a condition implic ſubject of *another contract*;

IF a perſon purchaſe cloth, on condition that the ſeller ſew it into the form of a veſt on his account, the ſale is in ſuch caſe invalid; ſince this condition, beſides being attended with an advantage to the purchaſer, is not a requiſite of the contract of ſale. Moreover, this neceſſarily ſuppoſes the implication of terms of *two different* contracts; that is, either of *ſale* and *loan*, or of *ſale* and *hire*.

IF a perſon purchaſe *one* ſhoe from another, on condition that the ſeller prepare a *fellow* to it on his account,—or purchaſe a *pair* of ſhoes on condition of the ſeller making ſtraps to them, for the purpoſe of tying them, the ſale in either caſe is invalid.—(The compiler of the *Hedâya* remarks that this is according to *analogy*; for a more favourable conſtruction would ſuggeſt that ſuch ſale is lawful, on account of its being cuſtomary amongſt men.)

or by a ſtipulation of the payment of the price, at a period not preciſely known to both parties,

IF a perſon ſhould purchaſe an article, and ſtipulate the payment of the price on the day of the new year, or on the *Mihrjân**, or on the faſt of the *Chriſtians*†, or the day of breaking lent amongſt the *Jews*, the ſale, under ſuch conditions, is invalid, provided both parties be not informed with certainty reſpecting thoſe periods. The ſale, however, is lawful, if theſe periods be aſcertained within the knowledge of both parties.

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* This is alſo termed *Mirhkân*. A feſtival obſerved by the ancient *Perſians* on the day of the autumnal equinox.

† *Eaſter*.

or the date of the occurrence of which is uncertain:

A SALE is not valid where the price is ſtipulated to be paid on the return of the pilgrims, or, on the cutting of the grain, or on the gathering of the grapes, or on the ſhearing of the ſheep,—becauſe in none of theſe caſes is the period abſolutely determinate: contrary to the act of *giving bail*; for the giving of bail, until any of theſe periods, is lawful; becauſe a *ſmall* degree of uncertainty does not invalidate a bail-bond, in the ſame manner as it does a contract of ſale.—

(but it is valid where the time of payment is fixed by a *ſubſequent agreement*.)

If, however, a ſale be made in an abſolute manner, and the ſeller afterwards agree to receive the price at any of the periods in queſtion, it is lawful, becauſe, this ſtipulation not being included in the contract of ſale, it becomes *a ſtipulation with regard to payment of* DEBT, (not the *price*) which admits of a ſmall degree of uncertainty.

A ſale, invalid in conſequence of ſti- [illegible] an [illegible] *time* of payment, recovers its validity by [illegible]

IF a ſale be made, ſtipulating payment of the price at any of the periods above ſtated, and afterwards the purchaſer and ſeller jointly, or the purchaſer alone, remove the obſtacle of uncertainty *, prior to the actual occurrence of the period ſtipulated, the ſale then becomes valid. *Ziffer* maintains that, the ſale being originally invalid, the ſubſequent removal of the obſtacle cannot render it valid; in the ſame manner as a marriage originally contracted for a fixed period would not become valid by rendering it perpetual. The argument of our doctors is, that the invalidity of the ſale, in this caſe, is merely becauſe of the apprehenſion of the litigation, to which the uncertainty may give riſe; and of courſe, when this uncertainty is removed, the ſale remains valid. Moreover, as the uncertainty, in this caſe, relates only to an *accidental circumſtance*, that is, to the *period* when the price is to be paid, and not to the *price itſelf*, which is one of the eſſentials of ſale, the uncertainty is capable of being removed. It is otherwiſe where a perſon ſells one *dirm* for two *dirms*, and afterwards relinquiſhes the additional *dirm*; for the ſale does not in conſequence of ſuch relinquiſhment become valid, ſince the invalidity related to the price itſelf which is an eſſential of the ſale. It is alſo otherwiſe in a caſe of *marriage* for a particular period, becauſe this, in fact, is not a *marriage*, but a ſeparate deed called *Matdt* *, and by no ſubſequent acts can one deed be tranſmitted into *another* deed.

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* By paying the *price*, or fixing the time of payment to ſome *ſpecific* period, ſuch as *forty days* for inſtance.

The ſale of a *ſaleable* with an

If a perſon expoſe to ſale a freeman and a ſlave, and ſell them both in one contract,—or, in the ſame manner, ſell a carrion goat †, and one that has been ſlain by the preſcribed form of *Zibby*,—ſuch ſale, according to *Haneefa*, is utterly invalid with reſpect both to the freeman and the ſlave, as in the *firſt* caſe, and the carrion, and ſlain goat, as in the *ſecond*;—and this, whither the ſeller have oppoſed a ſpecific price to each or not: (the two diſciples are of opinion that if a ſpecific price be oppoſed to each, the ſale is valid with reſpect to the *ſlave*, or the *ſlain* goat.) If, on the contrary, a perſon unite in ſale, an abſolute *ſlave* and a *Modabbir*, or a ſlave that is his property, and another that is *not*, the ſale is in either caſe lawful, with reſpect to the abſolute ſlave, or the ſlave which is his property, in return for a proportion from the whole price ſtipulated. This is, according to our doctors, (namely, *Haneefa* and the two diſciples.)—*Ziffer* is of opinion that the ſale is not lawful in either caſe, with reſpect to either ſubject. The two diſciples argue, that where a ſpecific price is oppoſed to each particular ſubject, the invalidity of the ſale extends only to that ſubject which contains a *cauſe* of invalidity, (namely, the *freeman* or the *carrion*) but does not reach to the *other* ſubjects, (namely, the ſlave or the ſlain goat;)—in the ſame manner as where a perſon marries a ſtrange woman and his own ſiſter by one contract, in which caſe the marriage is valid with reſpect to the ſtranger, although it be invalid

but if the *unſaleable* ſubject be *property*, the ſale holds good with reſpect to the *ſaleable* with reſpect to his *ſiſter*,—for that invalidity does not extend to the ſtrangers;—and ſo alſo in the caſe in queſtion. It is otherwiſe where the price of each particular ſubject has not been ſpecified; for in that caſe the invalidity extends to the whole. *Haneefa* argues that there is a material difference between the two caſes;—namely, the caſe of joining in ſale a *freeman* with a ſlave, and that of joining a *Modabbir* with a ſlave; becauſe a freeman, as not being property, is utterly incapable of being included in a contract of ſale; and as the comprehenſion of him in the ſale neceſſarily eſtabliſhes the condition of the acceptance of the ſale with reſpect to *him*, it follows that the ſale is invalid, becauſe of the invalidity of the condition: contrary to *marriage*, as that is not rendered invalid by an invalid condition. The ſale, on the other hand, of a ſlave the property of another, or of a *Mokâtib*, *Modabbir*, or *Am-Walid*, is merely *ſuſpended*, for theſe may be included in a contract of ſale, as they are property,—whence it is that the ſale of them may be carried into execution, in the caſe of the *ſtranger*'s ſlave, by the conſent of the proprietor,—in the caſe of a *Mokâtib* by his *own* conſent,—and in the caſe of a *Modabbir* or *Am-Walid* (in the opinion of the two *Elders*) by a decree of the *Kâzee* to this effect;—but as it is to be ſuppoſed that the proprietor of the ſlave, on account of his right to the ſubject of the ſale, and the *Mokâtib*, *Modâbbir*, or *Am-Walid*, becauſe of the claims eſtabliſhed in their perſons, will repel the ſale, the ſale therefore is executed only with relation to the abſolute ſlave; in the ſame manner as where a perſon purchaſes two ſlaves, of whom one dies previous to the purchaſer taking poſſeſſion of them; in which caſe the ſale holds good with reſpect to the other.

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* See Vol. I. p. 91. † Meaning any dead goat, not ſlain according to LAW.

SECTION.

Of the Laws of Invalid Sales.

WHENEVER the purchaſer, in an invalid ſale, takes poſſeſſion of the goods, with the conſent of the ſeller, then, provided both the goods and the price be property *, the purchaſer becomes proprietor of the article ſold, and remains reſponſible, not for the *price*, but for the *value* of the goods, in caſe they be deſtroyed in his poſſeſſion. *Shafeï* maintains that the purchaſer does not become proprietor, although he *take poſſeſſion* of the article, becauſe an invalid ſale is forbidden, and therefore cannot ſubſtantiate a right of property: beſides, any thing which is *forbidden* is not ſanctioned by the LAW, ſince *prohibition* is repugnant to *ordinance*; an invalid ſale, therefore, is in no reſpect ſanctioned by the LAW; (whence it is that the purchaſer of goods does not become proprietor before ſeizin;) and the caſe is conſequently the ſame as if a perſon ſhould ſell ſomething in exchange for carrion, or ſhould ſell *wine* in exchange for *money*. Our doctors, on the other hand, argue that, in this caſe, the *eſſential* of ſale (namely, an exchange of property for property) exiſts. The *ſubject* of the ſale, moreover, is property, and is therefore a *fit* ſubject. The buyer and ſeller alſo are both competent to the act:—and where all theſe circumſtances exiſt, the ſale is duly contracted. Beſides, the prohibition is no way repugnant to the legality of the *ſale itſelf*, becauſe the prohibition relates only to an *acceſſary* circumſtance, namely an *invalid condition*; the right of property, therefore, after ſeizin, accrues to the purchaſer in virtue of the *ſale itſelf*, which is legal, and

In an *invalid* ſale, the purchaſer is reſponſible, not for the *price*, but for the *value*, of the article, in caſe of its pe- [illegible] it *by conſent of the ſeller*;

That is, be of ſuch a nature as to conſtitute property.

not in virtue of any matter which is *prohibited*, or contrary to the LAW. The purchaſer, moreover, does not become proprietor of the goods *before* ſeizin, for two reaſons:—FIRST, becauſe, although an invalid ſale be a *cauſe* of right of property, yet it is a *weak* cauſe, and therefore ſtands in need of the aid of ſeizin to give it effect:—SECONDLY, becauſe, if the purchaſer become proprietor *previous* to the ſeizin, it would neceſſarily follow that a ſanction is given by LAW to the invalidity, whereas it is incumbent to *remove* the invalidity. With reſpect to the caſes of a ſale of any thing in exchange for *carrion*, or of *wine* in exchange for *money*, the eſſentials of ſale do not exiſt in either of theſe, as has been already demonſtrated. It is eſtabliſhed as a condition, in this inſtance, that the ſeizin be made *with the conſent of the* SELLER; it is ſufficient, however, (according to a favourable conſtruction of the LAW,) if this conſent be by *implication*; as if the purchaſer ſhould make the ſeizin *in the place of ſale*, and *in preſence of the ſeller*. The reaſon for a *favourable* conſtruction of the law, in this particular, is, that as the ſeller, by the contract of ſale, virtually impowers the purchaſer to make ſeizin, and as the purchaſer does ſo in his preſence, without his making any objection thereto, it is therefore conſtrued to have been made *with his conſent:* in the ſame manner as the ſeizin of a gift, in the place where the deed of gift is executed, is valid according to a favourable conſtruction of the law. It is alſo a condition, that both the goods and the return be *property*, in order that an *exchange of property for property* (which is one of the *pillars* of ſale) be eſtabliſhed; for if this were not the caſe, the ſale would be *null*, in the ſame manner as a ſale in return for *carrion*, *blood*, the perſon of a *freeman*, *air*, or the like; and hence if, in theſe caſes, the purchaſer ſhould take poſſeſſion of the goods with the conſent of the ſeller, ſtill he is not reſponſible for them. With reſpect to what was ſtated, that the ſeller "remains reſponſible, not for the *price*, but for the *value* "of the goods," it relates only to ſuch goods as are of a nature to be compenſated for by *money*; for with reſpect to ſuch as are compenſable by *ſimilars*, the purchaſer is reſponſible for a *ſimilar*; becauſe that

and the value muſt be paid in *money*, or in a *ſimilar*, according to the nature of the article.

that which is a ſimilar both in *appearance* and in *effect* is a more equitable compenſation than that which is ſimilar in *effect* only.

Either party may annul the

In an *invalid* ſale, either of the parties, previous to the ſeizin, has the power of annulling the contract, in order that the invalidity of it may be removed. The law is alſo the ſame *after* ſeizin, provided the invalidity exiſt in the body of the contract. If, however, the invalidity be occaſioned by the addition of an *invalid condition*, the perſon ſtipulating the condition is allowed to annul it, but not the *other* party.

A purchaſer

ticle,

in which caſe his right of annulling the ſale expires.

If the purchaſer, in an invalid ſale, take poſſeſſion of the article, and then ſell it, in that caſe the ſecond ſale is valid,—as the firſt purchaſer, having become proprietor in virtue of ſeizin, is fully competent to ſell the article:—and, upon his ſo doing, the right of returning the article to the firſt ſeller expires:—FIRST, Becauſe the right of the *individual* (namely the *ſecond purchaſer*) is connected with the ſecond ſale; and the annulment of the firſt ſale in conſequence of its invalidity, is on account of the right of GOD*; but the right of the individual has preference to the right of GOD, as the individual is neceſſitous, whereas GOD is *not* ſo:—SECONDLY, Becauſe the *firſt* ſale is legal in its *eſſence*, but *invalid* in its *quality*,—whereas the *ſecond* ſale is legal in point of both; and it follows that the *latter* cannot be obſtructed in its operation by the *former*: and, THIRDLY, becauſe the ſecond ſale is made with the *virtual* aſſent of the *firſt* ſeller, as the power to that effect was by him beſtowed on the firſt purchaſer.—It is otherwiſe where the purchaſer of a houſe, in which there is a right of *Shaffa*, ſells it to another; for there the perſon entitled to the right of *Shaffa* has nevertheleſs a juſt title to it; becauſe it is the right of the *individual*, in the ſame manner as that of the ſecond purchaſer; is equal to it in point of legality; and has not been forfeited by any power given by him to the purchaſer to make the ſale.

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* In other words,—*the right of the* LAW

The purchaſer of a *lawful* article in re- one *un-* may after poſſeſſion diſpoſe of it as he ſees fit; remaining reſponſible only for the *value.*

If a perſon purchaſe and take poſſeſſion of a ſlave, in exchange for *wine*, or a *hog*, and afterwards either emancipate him, ſell him, or beſtow him in gift, all of theſe acts are valid, becauſe of the purchaſer, in virtue of the ſeizin, having become proprietor; and he is reſponſible to the ſeller for the value of the ſlave. In the caſe of *emancipation*, as the property immediately ceaſes, the ſlave becomes (as it were) *deſtroyed*, and hence proceeds the reſponſibility of the purchaſer for the value. In the caſe of *ſale* or *gift*, the reſponſibility ariſes from the right of returning him to the ſeller being annulled in conſequence of theſe deeds, as has been already explained. It is to be obſerved that *pawnage*, or the making a ſlave a *Mokâtib*, is equivalent to *ſale*, and therefore annuls the right of return to the ſeller. The redemption of the pledge, however, or the inability of the *Mokâtib* to perform his covenant, reſtores the right, becauſe the bar to its operation is removed.

The ſeller e purchaſe-money: and if the ſeller die, the purchaſer is entitled to ſet up the article to ſale, to indemnify himſelf for the price he has

In an invalid ſale, the ſeller is not allowed to reſume the goods from the purchaſer, until he ſhall have firſt reſtored the purchaſe-money; becauſe the goods, being oppoſed to the purchaſe-money, are retained in the nature of a pledge until the reſtitution of it. If the ſeller ſhould die, then the purchaſer has a prior claim to the ſubject of ſale; that is, he is permitted to take payment of the price from the ſale of the goods, giving the remainder (if there be any) to the other claimants; becauſe, as he has a right in the goods ſuperior to any other perſon, during the lifetime of the ſeller, he conſequently has a right preferably to the ſeller's heirs or creditors after his deceaſe; in the ſame manner as the holder of a pawn. It is to be obſerved, that if the price was paid in *dirms*, the purchaſer has a right to exact from the ſeller the identical *dirms* he paid him; ſince the purchaſe-money, in the caſe of an *invalid* ſale, remains in the hands of the ſeller in the nature of an *uſurpation.* If, however, the identical *dirms* be not in his poſſeſſion, then the purchaſer is entitled to an equivalent.

Caſe of an *immoveable* property, in which a change is wrought by a purchaſer under an invalid contract.

IF a perſon purchaſe a houſe by an invalid ſale, and afterwards convert it into a moſque, he is in that caſe reſponſible, according to *Haneefa*, for the value of the houſe. This is alſo related by *Aboo Yooſaf*, in the *Jama Sagheer*, as the opinion of *Haneefa:* but he afterwards entertained doubts reſpecting it. The two diſciples maintain that the houſe muſt be reſtored to its original ſtate, and then returned to the ſeller.—The ſame difference of opinion obtains, if the purchaſer ſhould plant trees in the court-yard of the houſe. The argument of the two diſciples is that the right of the *neighbour*[*] is of weaker conſideration than the right of the *ſeller*;—(whence it is that the right of a neighbour requires to be ſupported by a decree of the *Kâzee*, and alſo, that it becomes null, by any delay in the demand of it,—neither of which is the caſe with reſpect to a *ſeller*'s right;) and as the right of the neighbour, which is the *weaker* right, would not be annulled by the converſion of the houſe into a moſque, it follows that the right of the *ſeller*, which is the *ſtronger*, is not thereby annulled *a fortiori.* The argument of *Haneefa* is, that the act of building or planting proceeds on an idea of perpetual poſſeſſion; that the purchaſer in ſo doing acts in virtue of a power to that effect which he holds from the ſeller; and that therefore the ſeller has no right to the reſtitution, in the ſame manner as in the caſe of its being reſold by the purchaſer. It is otherwiſe with the right of a *neighbour*, as he does not give power to the purchaſer to build or plant on the place over which his right extends; whence it is that if the purchaſer had either beſtowed it in a gift, or ſold it, his right of neighbourhood would nevertheleſs ſtill have remained in force. *Aboo Yooſaf*, who reported what is here advanced as the opinion of *Haneefa* on this ſubject, afterwards diſtruſted his memory, as has been already obſerved. *Mohammed*, however, in treating of *Shaffa**, expreſsly infers the difference of opinion here recited;—for, he ſays, "where a purchaſer, "under an invalid ſale, builds upon the ground he has purchaſed, "the neighbour has no right of *Shaffa* therein, according to the two "diſciples, any more than previous to the purchaſe." Now as *Haneefa*, on the other hand, has maintained that in ſuch caſe the neighbour is entitled to take the place, upon paying the value, in virtue of his right of *Shaffa*, it clearly follows that in his opinion the right of the ſeller is annulled; becauſe it is on this circumſtance that he founds his opinion of the exiſtence of the right of *Shaffa*, ſince ſo long as the right of the *ſeller* remains in force, that of the *neighbour* cannot take place;—whereas, according to the two diſciples, the right of the ſeller is not deſtroyed by the building of the purchaſer, and therefore the claim of *Shaffa* does not take place.

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[*] Arab. *Shaffee*; meaning the perſon entitled to the right of pre-emption in virtue of *Shaffa*.

The profit acquired by upon a definite article, purchaſed tract, muſt be beſtowed in charity;

IF a perſon purchaſe a *female ſlave* (for inſtance) by an invalid contract, and take poſſeſſion of her, and the ſeller take poſſeſſion of the purchaſe-money, and the purchaſer then diſpoſe of her, by ſale, to another perſon at a profit, it is in that caſe incumbent on him [the purchaſer] to beſtow in charity the profit ſo acquired:—but if the firſt ſeller ſhould have acquired a profit upon, or by means of, the purchaſe-money, he is not required to beſtow ſuch profit in charity. The reaſon of this diſtinction is that as the *female ſlave* (for inſtance) is a *definite* article, the *ſecond* contract of ſale relates identically to her, and the profit acquired by the ſale of her is accordingly *baſe*.—*Dirms* and *deenars*, on the other hand, are not *definite* in *valid* contracts; and as the *ſecond* contract is of a *valid* nature, it conſequently does not relate to them identically, and accordingly the profit acquired by them is *not* baſe. This diſtinction, however, obtains only where the baſeneſs is founded on the *invalidity* of the right; for where it is founded and ſo alſo,

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* In the *Mabſoot*.

right of pr

on the abſolute *non-exiſtence* of right of property,—(as where, for inſtance, a *uſurper* acquires a profit upon the property he has uſurped,)—there is no difference whatever;—that is, from whichever ſubject the profit is obtained, it is unlawful, and muſt be beſtowed in charity*; becauſe, where a perſon ſells an article, the identical property of another, (ſuch as any article of *houſehold goods*,) the contract of ſale relates to that actual article, and the profit acquired by it is accordingly unlawful;—where, on the other hand, a perſon purchaſes a thing with *money* belonging to another, although the contract do not relate to that actual money, (ſince, if other money were given inſtead of it, the contract nevertheleſs holds good,) ſtill, however, there is a *ſemblance* of the contract relating to that particular money; for if he were to give that actual money to the ſeller, the article purchaſed in return would remain appropriated to him; or if, on the contrary, he were only to *point* to that money, and then give other money inſtead of it, the amount of the price of the article is, virtually, in *that* money:—for this reaſon, therefore, there is a ſemblance of the contract relating to that money, and conſequently that the profit is acquired by means of the property of another perſon. Now, as the baſeneſs occaſioned by an *invalidity* of right is of leſs moment than that occaſioned by the abſolute *non-exiſtence* of right, it follows that the baſeneſs occaſioned by the *invalidity* in the right of property occaſions a *ſemblance* of baſeneſs in any thing in which the abſolute *non-exiſtence* of right occaſions *actual* baſeneſs; (and that is any thing of a *definite* nature, ſuch as a *ſlave girl*, for inſtance, as in the caſe in queſtion;)—and, on the other hand, that it occaſions an *apprehenſion* of a ſemblance of baſeneſs in any thing in which the abſolute *non-exiſtence* of right occaſions only a *ſemblance* of baſeneſs;—and regard is had to a ſemblance of baſeneſs, but not to an *apprehenſion* of a ſemblance.—It is to be obſerved that if a perſon claim a debt from another of a thouſand *dirms*, and obtain payment of the ſame, and both parties afterwards agree that the debt was not due,—in that caſe the profit which the claimant may in the mean time have acquired by poſſeſſion of the money is lawful to him; becauſe the *baſeneſs*, in this inſtance, is occaſioned by *invalidity* of right; for this reaſon, that the debt had been owing in conſequence of the demand of the claimant, and the defendant's acknowledgment of it; and it afterwards appears that this debt is *not* the right of the *claimant*, but of the *other*, (namely, the *defendant*:) ſtill, however, the thouſand *dirms* which the claimant took in ſatisfaction for his demand have become his property, as the ſatisfaction for a claim becomes the property of the claimant, although it be under an invalid right;—and as the baſeneſs, in this inſtance, is occaſioned by the mere *invalidity* of right of property, and not by the abſolute *non-exiſtence* of that right, it conſequently cannot operate, nor have any effect with reſpect to a thing of an *indefinite* nature, ſuch as *money*, for inſtance.

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* For an explanation of the principle on which this proceeds, ſee *Partnerſhip*, (Vol. II. p. 325.) where it is declared that "*profit cannot be lawfully acquired upon a property concerning which there is no reſponſibility.*"

SECTION.

Of SALES *and* PURCHASES *which are* ABOMINABLE.

It is abominable to enhance the price of mer- [illegible] price;

THE prophet has prohibited the practice of *Najiſh*,—that is, the enhancement of the price of goods, by making a tender for them, without any intention to purchaſe them, but merely to incite others to the offer of a higher price. The prophet has alſo prohibited the purchaſe of a thing which has already been bargained for by another; but this prohibition ſuppoſes that both parties had before come to a mutual agreement; for otherwiſe there is no impropriety in ſuch ſubſequent purchaſe.

THE PROPHET has alſo prohibited an anticipation of the market,—as where people meet the caravan, at a diſtance from the city, with a view of purchaſing the grain brought by the merchants, in order to ſell it to the people of the city at an enhanced price. This prohibition, however, proceeds on a ſuppoſition that the foreſtallers deceive the merchants with reſpect to the price of grain in the city; for otherwiſe there is no impropriety in this practice.

or, to pa ſtal ket;

THE PROPHET has alſo prohibited a *citizen* from ſelling for a *countryman*;—as where, for inſtance, a countryman brings grain or other goods into a city, and one of the citizens takes care of it, and acts as his agent, in order that he may ſell it at a high price to the people of the city.—Some have given a different explanation of this prohibition, by ſuppoſing it to allude to a *citizen*'s ſelling any thing at a high price to a *countryman:* but in the *Fattahal Kadeer* of *Moojtibba* the *former* is mentioned as the moſt authentic explanation.—It is to be obſerved, however, that this prohibition ſuppoſes that a ſcarcity of grain prevails in the city, as otherwiſe ſuch conduct is not improper.

or to enhance the price of towns, by a *citizen* ſelling for the *farmer*;

IT is abominable to buy or ſell on a *Friday* *, after the cryer proclaims the hour of prayer, becauſe GOD has ſaid, in the *Koran*, "WHEN YE ARE CALLED TO PRAYER, ON THE DAY OF THE "ASSEMBLY, HASTEN TO THE COMMEMORATION OF GOD, AND "LEAVE MERCHANDISING.". Moreover, if at ſuch time purchaſe and ſale were allowed, an *abſolute duty* (namely, attendance at prayers) would neceſſarily be omitted. It is to be obſerved, however, that although ſuch purchaſes and ſales be *abominable*, ſtill they are not

or to buy or ſell on a *Friday*.

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* Friday is the *Muſſulman* Sabbath.

it; for the invalidity, in ſuch inſtances, exiſts with reſpect merely to points that are *extraneous* and *additional*, and not with reſpect to the *eſſentials* of the contract, *nor with reſpect to the eſtabliſhment of any* condition eſſential to its obligation.

[illegible] ſet up ſale to the *higheſt bidder.*

A SALE to the *higheſt bidder* is not abominable. Thus, if a merchant, for inſtance, having ſhewn his wares to a purchaſer, ſhould receive from him a tender for them, but, before he had expreſſed his acquieſcence, ſhould receive a *higher* tender from *another*, in that caſe it is not abominable in him to ſell them to the latter;—becauſe the prophet ſold a cup and a ſheet to a higher bidder; and alſo, becauſe ſales of this kind are for the intereſt of the *poor*.

It is abominable to ſeparate two infant ſlaves, (or an *infant* and an *adult*.) related within the prohibited degrees, by a ſale of *one* of them;

IT is abominable for a perſon poſſeſſing two infant ſlaves, related to each other within the prohibited degrees, to ſeparate them from each other; and the rule is the ſame where one of them is an *infant* and the other an *adult*. This deciſion is founded on a declaration of the prophet, "*Whoſoever cauſes a ſeparation between a mother and her children, ſhall himſelf, on the day of judgment, be ſeparated from his friends by* GOD." It is, moreover, related that the prophet gave two infant brothers to *Alee*, and afterwards enquired of *Alee* concerning them, and being anſwered, by him, that "he had *ſold* one of them," the prophet then ſaid "*take heed! take heed!*" and repeatedly enjoined him to take him back. Beſides, one infant naturally conceives an attachment to another, and an adult perſon participates in the ſorrow of an infant, and hence the ſeparation of them in either caſe argues a want of tenderneſs to a child, which has been reprobated in the traditions, where it is declared "*Whoſoever does not ſhew tenderneſs to a* CHILD, *and reſpect to an* ELDER, *is not of my people.*" A ſeparation, therefore, either between two *infants*, or between an *adult* and an *infant*, is prohibited. It is to be obſerved that the cauſe of the prohibition, in this inſtance, is *affinity within ſuch a degree only as prohibits marriage* between the ſlaves in queſtion, and not *general* affinity, for which reaſon any *diſtant* relation, ſuch as a *ſtep*-mother, or one prohibited by foſterage, or by affinity with the foſterer, are not included; nor the ſon of the uncle; nor any one that is not within the prohibited degrees. Neither are a *huſband* and a *wife* included in this prohibition, notwithſtanding they be both infants, and they may conſequently be ſeparated, becauſe the tradition which contains the prohibition, as being contrary to analogy, muſt therefore be obſerved in its *literal* ſenſe; that is, it muſt be applied to ſuch only as are within the prohibited degrees. Moreover, in the aforeſaid tradition, both relations are required to be the property of one maſter: if, therefore, one infant brother belong to *Zeyd*, and another infant brother to *Omar*, each is at liberty to ſell his reſpective property. It is allowed, likewiſe, to ſeparate two infant ſlaves related to each other, if with a view to fulfil an incumbent duty, as where one of the two commits a crime, and is given up, as a compenſation for ſuch crime, to the avenger of the offence. In the ſame manner, alſo, one of the two may be ſold, for the payment of a debt incurred by him in the courſe of purchaſe and ſale, in conſequence of his being a privileged ſlave,—or, by the deſtruction of the property of another,—in either of which caſes that ſlave may be ſold alone, in diſcharge of the debt, although this induce a ſeparation.—So alſo, it is lawful to return one of the two to the ſeller of them, in caſe he ſhould prove defective. The adjudication, in all theſe caſes, proceeds on this principle, that the object of the prophet in this prohibition was to prevent an injury to the *infants* without detriment to the *proprietor*; an object which, if the prohibition were extended to theſe caſes, muſt neceſſarily be defeated.—It is to be obſerved, however, that if a perſon ſeparate *one* infant from *another*, or an *infant* from an *adult*, by *ſelling* one of them, ſuch ſale is valid: yet ſtill the act of *ſeparation* is *abominable*. It is recorded, from *Aboo Yooſaf*, that a ſale of this nature is invalid only where the relation of *paternity* (ſuch as *mother* and *ſon*, for inſtance) exiſts between the parties; but that in all other caſes it is valid. Another

unleſs in the

unavoidable neceſſity:

but ſuch ſale is nevertheleſs valid.

Another report, from *Aboo Yooſaf*, mentions that ſales of this nature are invalid in all caſes where the *ſeparation* is abominable, becauſe of the tradition already mentioned with reſpect to *Alee*; for the prophet *poſitively enjoined* him to take back the ſlave he had ſold, whence it may be inferred that he conſidered the ſale as invalid, ſince a return of the commodity is not admitted but in an *invalid* ſale. The reaſoning of *Haneefa* and *Mohammed* is that, in the caſe in queſtion, the ſale is tranſacted by a competent perſon, and with reſpect to a fit ſubject: it is therefore valid; and the abomination does not apply to any thing except what is merely a *concomitant*, or *immediate effect* of the ſale, namely, the diſtreſs occaſioned to the two infants, which is a degree of abomination exactly equivalent to that of a perſon *purchaſing* a thing over the head of another, from whence no invalidity ariſes.—Moreover, the order of the prophet to *Alee* to take back the ſlave muſt be conſtrued either into a *diſſolution* of the ſale, or a repurchaſe of the ſlave from the perſon to whom he had ſold him.

Adult ſlaves may be ſeparated without offence.

It is not abominable to ſeparate two ſlaves that are *adults*, notwithſtanding they be related within the prohibited degrees; for this caſe falls not under the ordinance before mentioned; and there is an authentic tradition of the prophet having occaſioned a ſeparation between *Maria* and *Sireen*, two female ſlaves that were ſiſters.

CHAP. VI.

Of *Akâla*, or the *Diſſolution* of Sales.

Definition of *Akâla.*

literally ſignifies to *cancel.*—In the language of the LAW it means the *cancelling* or *diſſolution* of a *ſale.*

A ſale may be diſſolved in conſider- ation of an

but not for any thing *greater* or *leſs.*

THE diſſolution of a ſale is lawful, provided it be for an equivalent to the original price, becauſe the prophet has ſaid "*whoſoever makes* "*an* AKÂLA *with one who has repented of his bargain, ſhall receive an* "AKÂLA *of his ſins from* GOD, *on the day of judgment*;"—and alſo, becauſe, as the contract of ſale comprehends the rights of both parties, namely, the buyer and the ſeller, they have therefore the power of diſſolving ſuch contract, to anſwer their own purpoſes.—If, however, either a greater or leſs ſum than the original price be ſtipulated as the condition of the diſſolution, ſuch condition is null, and the diſſolution holds good; and the ſeller muſt return to the purchaſer a ſum equal to the original price.—It is a rule with *Haneefa*, that a *diſſolution* is a *breaking off* of the contract with reſpect to both the parties, but a ſale *de novo* with reſpect to others. If, therefore, the breaking off be impracticable, the diſſolution is null.—According to *Aboo Yooſaf*, on the other hand, it is a ſale *de novo:* but if a new ſale ſhould from any cauſe be impracticable, then it muſt be conſidered as a *breaking off*: and in caſe of that alſo being impracticable, the diſſolution then becomes null.—The opinion of *Mohammed* is that it is a *breaking off*; and in failure of this, from impracticability, a ſale *de novo*; and in caſe of that alſo being impracticable, it is null.—The argument of *Mohammed* is that *Akâla*, in its *literal* ſenſe, ſignifies *diſſolution*; and, in its *conſtructive* ſenſe, *ſale*; (whence it is a ſale *de novo* with relation to all others than the parties:) it is therefore regarded as a *diſſolution* or *breaking off*, agreeably to the *literal* meaning of the term; or, if the *breaking off* be impracticable, it is regarded as a *ſale*, agreeably to the *conſtructive* meaning.—The argument of *Aboo Yooſaf* is that *Akâla* means *an exchange of property for property with the mutual conſent of the parties*, which correſponds with the definition of *ſale*, and is alſo ſubject to the ſame rules; whence it is that, in caſe of the loſs of the wares in the poſſeſſion of the purchaſer after the concluſion of the *Akâla*, or *diſſolution*, it [the *Akâla*] is null; and alſo, that the ſeller is allowed to return the wares to the purchaſer in caſe of their having been blemiſhed or become defective whilſt in the hands of the purchaſer; and that the right of *Shaffa* is alſo eſtabliſhed by it.—*Haneefa*, on the other hand, argues that *Akâla* means a *diſſolution*, or *breaking off*, and cannot, by any conſtruction of it, be ſuppoſed to mean *ſale*, although the breaking off ſhould be impracticable; becauſe *ſale* and *diſſolution* are terms of oppoſite import, which no *one* word can be ſuppoſed to bear:—if, therefore, the *breaking off* be impracticable, the *Akâla* is null. With regard to its being a *ſale de novo*, in relation to others, this is a mere matter of neceſſity, as to *them* it exhibits ſimilar effects with ſale; that is to ſay, the ſeller, in virtue of the *Akâla*, becomes again proprietor of the wares; and it is accordingly a *ſale* with reſpect to all others than the ſeller and purchaſer, for *this* reaſon, and *not* becauſe of the *meaning* of the word, which in reality is the *oppoſite* of ſale.—Such are the opinions and arguments of our three doctors with regard to *Akâla.*—Hence it appears that if a ſtipulation be made, that the ſeller ſhall return to the purchaſer a ſum *greater* than the original price, the *diſſolution*, agreeably to the tenets of *Haneefa*, would hold good to the amount of the original price; becauſe (according to his tenets) *Akâla* is a *diſſolution*; and a diſſolution cannot poſſibly relate to the exceſs, as there is no ſale which might be oppoſed to ſuch exceſs; and it is impoſſible to diſſolve what does not exiſt:—the *condition*, therefore, is invalid, but not the diſſolution, as that is not rendered null by involving an invalid condition.—It is otherwiſe

wiſe with reſpect to *ſale*,—(that is, the ſale of *one* DIRM for *two* DIRMS, for inſtance,)—for if a perſon ſhould ſell one *dirm* for two *dirms*, ſuch ſale would be invalid; nor could it be conſtrued as exiſting with reſpect to one *dirm*, and as null with reſpect to the additional one, ſo as to render ſuch ſale lawful; becauſe the eſtabliſhment of an exceſs in ſale is poſſible, as that is an eſtabliſhment of a matter as yet uneſtabliſhed, and it is no way difficult to eſtabliſh an *un*eſtabliſhed point; but if the exceſs *dirm* were eſtabliſhed, it would induce *uſury*:—a ſale of this nature, therefore, is invalid.—The concluſion therefore is, that the diſſolution in queſtion is valid, but the condition is otherwiſe. The law is alſo the ſame where a ſtipulation of a *ſmaller* amount than the original price is made; that is to ſay, the diſſolution holds good, but the condition is void; becauſe, the ſale being eſtabliſhed with regard to the original price, and the deficiency not then exiſting, it follows that the diſſolution can apply only to what *does* exiſt,—namely, the original price,—ſince it is impoſſible to diſſolve what does *not* exiſt.—If, however, this deficiency be ſtipulated on account of a defect which had taken place in the wares, it is lawful.—In the opinion of the two diſciples, the ſtipulation of a ſum exceeding the original price, in a diſſolution, amounts to a *ſale*:—according to *Aboo Yooſaf*, becauſe (as has been already explained) he conſiders *Akâla* as a *ſale*;—and alſo according to *Mohammed*, becauſe, although he be of opinion that a *diſſolution* is a *breaking off*, yet he has ſaid that, in caſe of the impracticability of a *breaking off*, it muſt be conſidered as a *ſale*; and as the diſſolution in queſtion is of that nature, he is therefore of opinion it is a *ſale*.—With reſpect to a diſſolution in which is ſtipulated an amount leſs than the original price, *Aboo Yooſaf* (proceeding on his general opinion concerning diſſolutions,) conſiders it as a *ſale*: but in the opinion of *Mohammed* it is a *diſſolution* with reſpect to the whole of the original price; becauſe he conſiders the deficiency to be a ſilence maintained with reſpect to a *part* of the price; and as the diſſolution would have been valid if a ſilence had been maintained with reſpect to the *whole*, ſo it is in a ſuperior degree

valid

valid when the ſilence is maintained only with reſpect to a *part.* A diſſolution, ſtipulating a ſmaller ſum than the original price, in a caſe where the wares have been blemiſhed in the hands of the purchaſer, is conſidered by *Mohammed* as a diſſolution; the *deficiency* being oppoſed to the *blemiſh.*

Diſſolution, in conſideration of an [illegible] nt of [illegible] a [illegible] *off.*

If a diſſolution be agreed upon, ſtipulating, in lieu of the original price, an equivalent of a different kind, it is a breaking off*, according to *Haneefa*, for the *original price*; and the ſtipulation of a different kind is nugatory. The two diſciples conſider this diſſolution as a *ſale*, founding their opinion on their ideas of the nature of diſſolutions, as already explained.

The ſale of a female ſlave cannot be annulled after ſhe has borne a child.

If a diſſolution of ſale take place with reſpect to a female ſlave who had borne a child whilſt in the poſſeſſion of the purchaſer, it is null, according to *Haneefa*, becauſe (agreeably to his tenets) a *diſſolution* is a *breaking off*; and the birth of the child is preventive of a diſſolution, as this is a ſupervenient addition of a ſeparate thing; and ſuch addition, after ſeizin, prevents a diſſolution of the bargain.—This diſſolution, however, is conſidered as a *ſale* by the two diſciples.

A ſale may be diſſolved previous to delivery and ſeizin of the article.

The diſſolution of a ſale previous to taking poſſeſſion of the article ſold, whether of a *moveable* or *immoveable* deſcription, is a *breaking off*, according to *Haneefa.* According to *Aboo Yooſaf* it is a *breaking off* with regard to *moveable* property only, becauſe a ſale of moveable property, previous to taking poſſeſſion of it, is not lawful, and hence a diſſolution with reſpect to moveable property, previous to the ſeizin of it, cannot be conſidered as a *ſale*, and is conſequently a *breaking off.* A diſſolution with reſpect to *immoveable* property, on the contrary, previous to the taking poſſeſſion of it, is a *ſale*, (accord-

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And conſequently valid, as it completely annuls the contract.

ing to *Aboo Yooſaf*,) as he holds that the ſale of immoveable property, previous to the ſeizin of it, is lawful.

THE loſs or deſtruction of the *wares* is a bar to the legality of a diſſolution, but not the deſtruction of the *price*; becauſe a *diſſolution* is the *breaking off of ſale*; and the breaking off of a ſale reſts upon the exiſtence of the ſale; and this again relates to the *wares* not to the *price*.

diſſolved, after a deſtruction of one of th

IN caſes of *Mookâyeza*, or a ſale of goods for goods [*], a diſſolution agreed upon after the deſtruction of one of the two ſubjects is valid; becauſe each of them falls under the deſcription of the ſubject of the ſale; and applying this term, therefore, to the one that remains, it follows that the diſſolution is lawful, becauſe of the exiſtence of the ſubject of the ſale.

CHAP. VII.

Of *Moorâbihat*, and *Tawleeat*, that is, *Sales* of *Profit* and of *Friendſhip* [†].

Definition of *Moorâbihat* and *Tawleeat*.

MOORÂBIHAT, or a *ſale of profit*, means the ſale of any thing for the price at which it was before purchaſed by the ſeller, with the ſuperaddition

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[*] That is, *barter*:—the term by which *Mookâyeza* will be hereafter always expreſſed.

[†] *Moorâbihat* and *Tawleeat* are technical terms, which (like many others in this work) do not admit of a literal tranſlation. Neither is the definition of them, as here given (according to the *Perſian* verſion of the *Hedâya*) completely ſatisfactory. In the *Arabic* copy,

addition of a particular ſum by way of *profit.* *Tawleeat*, or a *friendly* ſale, is where one perſon ſells any thing to another for the exact price which he himſelf paid for it. Both theſe modes of ſale are lawful; becauſe the conditions eſſential to the validity of a ſale exiſt in them; and alſo, becauſe mankind ſtand in need of them. For example, a man who has himſelf no ſkill in making purchaſes is neceſſitated to confide in a purchaſe from a perſon ſkilled in ſuch matters; in other words, he will purchaſe the article from this perſon at the ſame rate at which *he* had purchaſed it, without allowing him any profit upon it, as in a caſe of *Tawleeat*, or *friendly* ſale,—or, he will purchaſe it from him, at the ſame rate at which *he* had purchaſed it, allowing him an addition, by way of profit, as in a caſe of *Moorâbibat*, or *profitable* ſale: and this will leave him ſatisfied and at eaſe in his mind; ſince a perſon deſtitute of ſkill is by either of theſe modes ſecured from fraud, whereas, following any *other* mode, he would be expoſed to great impoſture. Mankind, therefore, having occaſion for both theſe modes, they are both permitted:—and as, in both inſtances, the purchaſer is under a neceſſity of placing an abſolute confidence in the word of the ſeller, who is ſkilled in the buſineſs of traffic, it is therefore incumbent on the ſeller to be juſt and true to his word, and to abſtain from fraud, or from the *ſemblance* of fraud. *Fraud* is where a perſon avers that he had purchaſed a certain thing for twelve *dirms*, when, in fact, he had only paid ten *dirms*; and the *ſemblance* of fraud is where a perſon ſells any thing by a profitable ſale,

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copy, a *Moorâbibat* is defined to mean "*a transfer, made by the proprietor, under the original contract, at the original price, with the addition of a profit,*"—and *Tawleeat* "*a transfer, by the proprietor, under the original contract, at the original price, without an addition of profit.*" Hence it would appear that, in a caſe of *Moorâbibat*, the contract [of *Moorâbibat*] refers itſelf merely to *the profit agreed for*, and not (as in other ſales) to *the whole price to be paid*, ſince that (excluſive of the *profit* alone) is determined by the *nature* of the contract, without ſpecification; and that, in a caſe of *Tawleeat*, on the other hand, the contract [of *Tawleeat*] refers itſelf to the original price, ſince that is fixed at the *prime coſt*, from the nature of the contract.

ſtipulating prompt payment, when, in reality, he had himſelf purchaſed the ſame thing on *credit*.

PROFITABLE and friendly ſales are lawful only where the *price* of the wares is of the deſcription of *ſimilars*, ſuch as *dirms* and *deenars*, for inſtance; becauſe, if the price ſtipulated be an article of which the unities are not ſimilar, (ſuch as a *ſlave*, for example,) it follows that the purchaſer becomes proprietor of the wares for a price of which the value is unknown, a circumſtance which induces illegality in a ſale. If, however, the purchaſer * ſhould, in the mean time, have acquired poſſeſſion of the price, (as if, for inſtance, the price be a *ſlave*, and that identical ſlave be then the property of the purchaſer) in ſuch caſe a ſale of *friendſhip* is lawful; and alſo a ſale of *profit*,—provided the *profit* be ſtipulated in money, or in articles eſtimable by weight, or meaſurement of capacity, which are deſcribed and aſcertained;—becauſe the purchaſer is in this caſe enabled to make delivery of the thing which he has rendered obligatory on himſelf. It is not lawful, in a ſale of this nature, to ſtipulate a profit proportionate to part of the price, (ſuch as a profit of one *dirm* upon ten, two upon twenty, and ſo forth;) becauſe the particular value of the price [the ſlave] not being aſcertained, this could not be carried into practice:—it is neceſſary, therefore, to ſtipulate a general profit upon the whole price.

They require that the price conſiſt of *ſimilars*; or, if otherwiſe, that the perſon who enters into the agreement with obtained ſeſſion of the price in the agreed fo muſt be in money or ſpe- of capacity, an upon the whole price, generally, and not proportionably upon its parts.

IT is lawful for the ſeller †, in a profitable or friendly ſale, to add to the capital ſum ‡ the wages of the bleacher, the dyer, or the

All intervening expences which enlue of the article may be added to the prime coſt.

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* Meaning the perſon who enters into the *Tawleeat* or *Moorâbihat* agreement with the firſt purchaſer.

† Meaning the party who firſt purchaſed the article, and then agrees to transfer it by *Tawleeat* or a *Moorâbihat*. (The terms *ſeller* and *purchaſer* are thus to be underſtood throughout this ſection.)

‡ Arab. *Râs Mal*: meaning (in this place) the prime coſt or original price of the article.

[illegible] (of cloths,) the ſpinner (of cotton or wool,) or the porter (of *wheat*, and ſo forth;)—becauſe it is a cuſtom amongſt merchants to add ſuch expences to the capital ſum; and alſo, becauſe whatever is the cauſe of an increaſe either to the *ſubſtance* of the thing purchaſed, or to the *value* of it, is an addition to the capital:—this, moreover, is a general rule, applying to all the articles here mentioned; for the *dying*, *figuring*, or *ſpinning* is an increaſe to the *ſubſtance* of the article; and the bleaching of linen, or the porterage of *wheat*, and ſo forth, is an increaſe to their value, becauſe cloths are rendered more valuable by being bleached, and the price of wheat varies in different places. It is requiſite that the ſeller, in making or including ſuch addition, ſhould ſay "this article has coſt me *ſo much*," and not "I have purchaſed this at ſuch a rate," becauſe the latter aſſertion would be falſe. It is to be obſerved that the driving of goats from city to city is equivalent to the porterage of wheat; but neither the wages of the ſhepherd, nor the rent of the houſe in which the wares are kept, is to be included, as no increaſe with reſpect either to the *ſubſtance* or the *value* ariſes from theſe circumſtances:—neither are the wages of *a teacher of the* KORAN, or the like, to be included*, becauſe the increaſe of value obtained by *inſtruction* is acquired through the wiſdom and ability naturally exiſting in the ſcholar, which *laſt* is the immediate cauſe of an increaſe of value:—the charge, therefore, muſt be placed to the head of the *wiſdom*, or *natural ability*, which is the *immediate* cauſe, and not to the *teaching*, which is a *remote* cauſe.

ment of the price, the purchaſer may undo the bargain, or (in *Taw-*

IF, in a ſale of profit, the purchaſer ſhould diſcover that the ſeller had practiſed a fraud in ſtating the price of the wares, in ſuch caſe, according to *Haneefa*, the purchaſer is at liberty either to adhere to adhere to or undo the bargain, as he pleaſes; and in caſe ſuch fraud ſhould be practiſed in a ſale of *friendſhip*, the purchaſer is at liberty to deduct the amount of the fraud from the price. *Aboo Yooſaf* is of opinion that a deduction proportionate to the fraud muſt be made in either caſe; but that, in the ſale of *friendſhip* the deduction is made from the *price*; and in a ſale of *profit*, from both the *price* and the *profit*. *Mohammed* maintains that in both caſes the purchaſer has the option of adhering to or relinquiſhing the contract as he pleaſes:—for he argues that the mention of the *price* is to be regarded, as that is known; and the mention of *friendſhip* or *profit*, is made with a view to incite deſire, and is therefore to be conſidered as the *inducement*, in the ſame manner as the inducement of ſecurity againſt a blemiſh or defect; and conſequently, if the inducement fail, the purchaſer is at liberty with reſpect to the contract. The argument of *Aboo Yooſaf* is that, in caſes where friendſhip or profit are mentioned, it is an eſſential that friendſhip or profit be eſtabliſhed:—whence it is that the ſale in queſtion is concluded, if the ſeller ſay to the purchaſer, "I "have ſold this thing to you, by way of friendſhip, for its *original* "*price*,"—or, "I have ſold this thing to you for a *profit* on its ori"ginal price," provided its original price in both caſes be known and aſcertained. Now, ſuch being the caſe, it neceſſarily follows that a deduction muſt be made in proportion to the fraud of the purchaſer, in order that *Tawleeat* or *Moorâbihat* may be eſtabliſhed:—in a caſe of *Tawleeat* the deduction is made from the price; and in a caſe of *Moorâbihat* from the price and the profit. The argument of *Haneefa* is that if, in a ſale of friendſhip, no deduction be made for a fraud, the deſcription of *Tawleeat* no longer appertains to it, ſince the price, in ſuch a caſe, muſt otherwiſe exceed the *original* price, and conſequently the tranſaction, which is ſuppoſed a tranſaction of *friendſhip*, would be altered in its nature: a deduction is therefore adjudged:—if, on the other hand, no deduction were made in a *profitable* ſale, yet the ſale would ſtill retain its original nature of a *profitable* ſale, with the difference only of the extent of it; for which reaſon the purchaſer is at liberty to abide by or undo the contract as he pleaſes. Hence if, in a profitable ſale, after the purchaſer had become acquainted with the fraud, the wares ſhould be loſt or deſtroyed in his poſſeſſion,—or, if they ſhould have contracted ſome blemiſh preventive of a diſſolution of the ſale, the purchaſer is reſponſible, according to all the moſt authentic traditions, for the whole price, —ſince in ſuch a caſe no proportion whatever of the original price is oppoſed to the option of the purchaſer, ſo that he might deduct ſuch proportion, becauſe of the deſtruction of his option;—as holds in caſes of option of inſpection or condition of option. It is otherwiſe in caſes of option of *defect*; for there the claim which the purchaſer has on the ſeller relates to a loſs with reſpect to the wares, ariſing from a defect; and a deduction is accordingly made from the price on account of ſuch loſs, provided it be not in the power of the ſeller in any other way to repair ſuch loſs ariſing from defect.

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* In the ſale of a *ſlave*.

A profit by a *Moorâbihat* ſale cannot be

ſame article.

If a perſon purchaſe *cloth* (for inſtance,) and afterwards diſpoſe of it to another by *Moorâbihat*, and then repurchaſe it from that other at the price for which he had originally purchaſed it, in that caſe, if he ſhould again wiſh to ſell it by *Moorâbihat*, it is neceſſary that he deduct from the price fixed in the *laſt* ſale (calculating that at the rate of price in the *firſt* ſale,) the ſums of the profit he acquired in the intermediate ſale:—but if after ſuch deduction nothing remain, he is not allowed to ſell it by *Moorâbihat*. This is according to *Haneefa*. The two diſciples maintain that it is lawful for him to ſell it with an addition of profit grounded on the laſt ſale. To exemplify this caſe:—ſuppoſe that a perſon purchaſes cloth at ten *dirms*, afterwards ſells it to another for fifteen *dirms*, and again purchaſes it from that other for ten *dirms*; in this caſe, if he ſhould wiſh to reſell it by way of *profit*, he muſt fix the price at five *dirms*, being what in reality the cloth has coſt him, and what he ought therefore to found a profit upon:—ſuppoſe, on the other hand, that a perſon purchaſes a piece of cloth for ten *dirms*, and having ſold it to another for twenty *dirms*, afterwards repurchaſes it from that other for the original price, namely ten *dirms*; in this caſe he is not entitled to ſell it again with an addition of profit. The two diſciples maintain that he is in *both* caſes,

caſes entitled to ſell it for a profit on the laſt price; namely ten *dirms*; and their reaſons are, that the repurchaſe is a *new contract*, and has no connexion with the effects of the *former* ſale; and that therefore a profit may be impoſed, founded on the *ſecond* contract; in the ſame manner as if the ſecond purchaſer ſhould ſell it to a *third* purchaſer, and the firſt purchaſer repurchaſe it from the third one, in which caſe it would be lawful for the firſt purchaſer to ſell it at a profit on the *laſt* price, and ſo alſo in the caſe in queſtion. The argument of *Haneefa* is, that in the caſe in queſtion, there is an apprehenſion of the *firſt* profit being obtained by means of the ſecond contract, ſince until the perſon repurchaſed the cloth there was a poſſibility that he might return it upon the ſeller's hands in conſequence of a defect, and that his [the ſeller's] profit might thereby have been loſt, although upon his repurchaſing it from the purchaſer, this poſſibility vaniſhes, and the profit remains confirmed and eſtabliſhed. The apprehenſion, however, had exiſted; and in *Moorábihat* ſales apprehenſion is regarded as equivalent to certainty, out of caution; (whence it is that a profit of this nature is not allowed upon any thing given in compoſition; in other words, if a perſon be indebted to another to the amount of ten *dirms* for inſtance, and he compound the debt with his creditor by a piece of cloth, it is not lawful for the creditor to ſell this cloth at a profit of this nature over and above ten *dirms*, becauſe in the compoſition it is to be apprehended that the value of the cloth was *ſhort* of ten *dirms*, as compoſition is founded upon *remiſſion of a part*.)—In the caſe in queſtion, therefore, the ſeller, becauſe of the *apprehenſion* above ſtated, appears, in conſequence of the ſecond contract, to have purchaſed *five dirms*, together with the cloth, for *ten dirms*; he muſt therefore deduct *five dirms* from the whole, and declare that "the cloth has fallen to him for "five *dirms*;" and take his profit upon *thoſe five*. It is otherwiſe where the ſecond purchaſer ſells the cloth to a *third* perſon, and the firſt ſeller then repurchaſes it from this perſon; for in this caſe the acquiſition of the firſt profit is confirmed and eſtabliſhed by means of here the purchaſer, (or another,) did with deſign or intention deſtroy the eye; and it is conſequently requiſite that a proportionable deduction be made for a defect ſo occaſioned. The ſame rule alſo obtains where a purchaſer has cohabitation with a female ſlave, who is a virgin; becauſe *virginity*, being merely a *tender membrane*, is a conſtituent part of the ſlave, and this the purchaſer has deſtroyed.

If the article be damaged by an accident not proceeding from the ſeller, ſtill it is a proper ſubject of *Moorâbihat*.

If cloth which a perſon had purchaſed be burnt by fire, or damaged by vermin, in that caſe it is lawful for the purchaſer to diſpoſe of it by *Moorâbihat* without explaining either of theſe circumſtances: but if the cloth be torn in the folding and opening of it, it is not lawful for the purchaſer thus to diſpoſe of it without noticing the ſame to the party, becauſe the damage, in this caſe, is occaſioned by his own deed.

A miſtatement of a pay- payment, leaves it in power of the purchaſer to undo the bargain in a ſale either of *profit*

If a perſon, having purchaſed a *ſlave* (for inſtance) for one thouſand *dirms*, payable at a future period, ſhould afterwards ſell him for one thouſand *dirms*, payable *immediately*, with a profit of one hundred *dirms*, without noticing to the other the reſpite of payment he himſelf has obtained,—in that caſe the other, if he ſhould afterwards diſcover this circumſtance, is at liberty either to abide by or undo the bargain at his option; becauſe the ſuſpenſion of the payment reſembles an addition to the ſubſtance of the wares; and hence it is a cuſtom amongſt merchants, in granting a reſpite of payment, to increaſe the price of the merchandiſe. Now a *ſemblance*, in a ſale by profit, is deemed equivalent to *reality*; and hence it follows that the ſaid perſon did, as it were, purchaſe *two* things for one thouſand *dirms*, namely, a ſlave and a ſuſpenſion of payment; and afterwards ſold only *one* of theſe things by way of profit, grounded on the price which he paid for both; a fraud from which an abſtinence is particularly enjoined in caſes of *Moorâbihat*:—the purchaſer, therefore, has an option of adhering to or undoing the bargain as he pleaſes, as in the option from defect. If, however, the purchaſer ſhould deſtroy the wares, and then receive notice of the fraud which had been practiſed upon him, he is not in ſuch caſe entitled to make any deduction on that account from the price, becauſe no part of the price is in reality oppoſed to the ſuſpenſion of payment.

or of *friend-*

IF a perſon, having purchaſed a *ſlave* (for inſtance) for a thouſand *dirms*, payable at a future period, ſhould afterwards diſpoſe of him to another, by a *Tawleeat*, for a thouſand *dirms* ready money, without intimating the reſpite of payment, in that caſe the other, on diſcovery of this circumſtance, is at liberty either to abide by, or annul the contract, as he pleaſes; becauſe an abſtinence from a fraud of this nature is equally enjoined in *friendly* as in *profitable* ſales.—If, however, in this caſe, the purchaſer, having deſtroyed the ſlave, ſhould then become acquainted with the ſuſpenſion of payment that had been granted to the ſeller, it is incumbent on him to make a prompt payment, according to the agreement; nor is he entitled to make any deduction from the price on the ſcore of ſuſpenſion of payment, as before explained.—It is related, as an opinion of *Aboo Yooſaf*, that the purchaſer is in this caſe to pay the *value* to the ſeller, and to receive from him the whole of the price; in the ſame manner as holds (according to him) in a caſe where a creditor, having received payment of the debt due to him in a *bad* ſpecie, diſcovers this circumſtance after having expended them;—in which caſe he has a right to return to the debtor a ſimilar number of the ſpecie he had received, and to demand from him a like number of *good* ſpecie.—Some have ſaid that an appraiſement ought to be made of the value in the caſe of *prompt* payment, and alſo in the caſe of a *diſtant* payment; and that the difference ſhould be given by the ſeller to the purchaſer.—All that has been here advanced proceeds on a ſuppoſition of the ſuſpenſion of the payment being included in the contract of ſale; for if, *without* ſuch ſtipulation, it ſhould happen that the payment be made at a *diſtant* period, (as is often the caſe amongſt merchants,) there ſubſiſts, in ſuch caſe, a difference of opinion upon this point, whether, under theſe circumſtances, in a ſubſequent ſale of *profit* or of *friendſhip*, it be incumbent upon him to make known this matter.—Some have ſaid that ſuch notification is incumbent on him, ſince an eſtabliſhed cuſtom is equivalent to a condition.—Others, again, allege that he is under no neceſſity of giving ſuch notification, ſince it is evident that, as no condition was ſtipulated, the ſale was therefore for *prompt payment.*

In a ſale of *friendſhip* the rate muſt be ſpecified;

and the purchaſer has a right of option until after the ſpe-

If a perſon diſpoſe of a thing to another by a ſale of declaring that "he ſells it to him at the rate it had ſtood him in,"—and the purchaſer be not acquainted with that rate, the ſale is invalid, from the uncertainty with regard to the price:—if, however, the ſeller ſhould afterwards inform the purchaſer of the rate, at the ſame meeting, the ſale then becomes valid, but it ſtill remains in the option of the purchaſer to abide by or recede from the contract as he pleaſes, ſince the acquieſcence he had before expreſſed was not fully eſtabliſhed, from his ignorance of the price, and after the knowledge of it he has an option, in the ſame manner as in the caſe of an option of inſpection. The reaſon of the validity of this ſale is that the invalidity does not become firmly eſtabliſhed until the departure of the parties from the meeting.—When, therefore, the purchaſer, in the meeting, is informed of the price, it becomes the ſame as if a new contract had taken place after the purchaſer had acquired this knowledge; and it is for him to withhold his acquieſcence until the end of the meeting.—If, however, the parties ſhould ſeparate, the invalidity then becomes fixed; nor can it be removed by any knowledge which the purchaſer may afterwards obtain of the amount of the price.—Similar to this is the caſe where a perſon ſells cloth for the value which is marked upon it, but of which the purchaſer is ignorant; for ſuch ſale is invalid, but may be rendered otherwiſe by the explanation of the ſeller, before the breaking up of the meeting.

SECTION.

perty
be re-
before

IT is not lawful for a perſon to ſell moveable property, which he may have purchaſed, until he receive poſſeſſion of the ſame; becauſe the prophet has prohibited the ſale of a thing prior to the ſeizin of it on the part of the ſeller; and alſo, becauſe there is an unfairneſs in it, ſince, if the merchandiſe ſhould be loſt or deſtroyed before the ſeizin, the firſt ſale becomes null, and the property reverts to the former proprietor, in which caſe it muſt neceſſarily appear that the perſon in queſtion has ſold the property of another without his conſent.

but *land* may be re-ſold previous to ſeizin firſt p- chaſer.

THE ſale of land *, previous to ſeizin, is lawful, according to *Haneefa* and *Aboo Yooſaf*. *Mohammed* maintains that it is unlawful; becauſe the traditional ſaying of the prophet before quoted is *abſolute*, and not particularly confined to *moveable* property; and alſo, becauſe of its analogy to *moveable* property. Beſides, the *ſale* of land is ſimilar to the *hire* of it; in other words, as it is unlawful to *let* land before ſeizin, ſo is it likewiſe to *ſell* land before ſeizin. The reaſoning of the two diſciples is that, in the caſe in queſtion, the ſale is effected by competent parties with reſpect to a fit ſubject;—that there is no *unfairneſs* in it, ſince the deſtruction of *ground* is rare, whereas that of moveable property is *probable*;—and that the prohibition of the prophet is founded on the poſſibility of the unfairneſs already explained, which does not exiſt in the caſe of *land*, the deſtruction of it being rare.—Some have aſſerted that a leaſe of land before ſeizin, as adduced by *Mohammed*, is lawful in the opinion of the two diſciples.—Admitting, however, that it were unlawful according to *all* our doctors, it proceeds evidently on this principle, that a leaſe is made with a view to the produce, the deſtruction of which not being uncommon, the unfairneſs already explained (with reſpect to the ſale of moveable property before ſeizin) may conſequently take place in it. This, however, cannot happen with reſpect to the ſale of *ground*, the deſtruction of which is rare, and conſequently the one caſe is not analogous to the other.

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* Arab. *Akkâr*; meaning any ſpecies of immoveable property. *Zimeen* is the term uſed in the *Perſic* verſion, whence the tranſlator renders it *land*.

In the re-ſale of articles of weight, and

it is requiſite that the article be

again by the ſecond pur-

IF a perſon purchaſe articles eſtimable by a meaſure of capacity, as *wheat*,—or articles of weight, ſuch as *butter*,—as if he ſhould have purchaſed this wheat, on condition of its being equal to "ten buſhels,"—or "this butter, on condition of its weighing ten *mâns*,"—and if, having meaſured or weighed theſe articles accordingly, he ſhould then take them and ſell them to another, on the ſame condition of meaſure or weight, In that caſe it is not lawful for that other to ſell or uſe theſe articles, until he has meaſured or weighed them on his own account; becauſe the prophet has prohibited the ſale of wheat until it be meaſured both by the buyer and the ſeller; and alſo, becauſe there is a poſſibility of theſe articles exceeding the warranted quantity; in which caſe the exceſs, as being the property of the *ſeller*, would not be lawful to the purchaſer; and an abſtinence in the caſe of this poſſibility is neceſſary.—It is otherwiſe where the ſale is made by *conjecture*, without any condition of meaſurement; for the exceſs, in that caſe, is the right of the purchaſer; and it is alſo otherwiſe in the ſale of cloth by yards, for there likewiſe the exceſs is the right of the purchaſer; ſince yards (as has been already explained) are a *deſcription* of the cloth, and not a *quantity*, as in the caſe of articles of weight or meaſure of capacity.—It is to be obſerved that the meaſurement of the cloth by the ſeller, previous to the ſale, is not valid, although it ſhould have been done in the preſence of the purchaſer, becauſe the meaſurement of both the *ſeller* and *purchaſer* is required, and theſe terms are not applicable to the parties until after the ſale takes place. So alſo, the meaſurement made by the ſeller *after* the ſale is invalid, unleſs it be in the *preſence* of the purchaſer, becauſe the object of meaſurement is delivery, and without the preſence of the purchaſer is impracticable.

IF the *ſeller* only ſhould meaſure the merchandiſe *after* the ſale, in preſence of the purchaſer, a queſtion has ariſen, whether this be ſufficient?—or, whether it be not neceſſary that the purchaſer ſhould alſo examine it by his own meaſure?—Some have ſaid that the meaſurement of it by the ſeller only, is not ſufficient, according to the plain ſenſe of the tradition already quoted. The more approved doctrine, however, is that it is ſufficient, ſince by the meaſurement of the ſeller the quantity is aſcertained, and delivery completely eſtabliſhed. The tradition before quoted alludes to the junction of two contracts; as where, for inſtance, a perſon having purchaſed, meaſured, and taken poſſeſſion of a thing, afterwards ſell it to another; in which caſe it is neceſſary that the ſecond purchaſer himſelf meaſure it; and the meaſurement of the firſt purchaſer, who ſtands in the relation of ſeller to him, is not ſufficient, as will hereafter be more fully explained in the chapter of *Sillim* ſales.

It ſuffices, however, that the article be

the ſeller, in the purchaſer's preſence.

IT is related as an opinion of the two diſciples, that articles of *tale* are analogous to thoſe of *longitudinal meaſurement*; that is, if a perſon, having purchaſed and received articles of this nature on condition of their amounting to a particular number, ſhould afterwards ſell them to another on the ſame condition, there is, in that caſe, no obligation on that other to enumerate them on his own account, becauſe ſuch articles are not ſuſceptible of uſury.—It is related, alſo, as an opinion of *Haneefa*, that articles of tale are ſimilar to thoſe of weight, becauſe in regard to them the receipt of any exceſs beyond the ſtipulated number is unlawful to the purchaſer: articles of *tale* are therefore analogous to articles of *weight*.

In the re-ſale of articles of tale or
tudinal meaſurement, the telling or

The parties are at liberty to make any ſubſequent addition or abatement, with *reſpect* either to the *goods* or the *price*; and ſuch addition or abatement are incorporated in the contract.

It is lawful for the purchaſer to make an increaſe of the price in favour of the ſeller; and for the ſeller to make an increaſe in the merchandiſe in favour of the purchaſer;—and it is alſo lawful for the ſeller to make abatement from the price in favour of the purchaſer; and this increaſe or abatement is incorporated in the original contract; (that is to ſay, in caſe of an increaſe, the *original* and *additional* form of the price or the article; and in caſe of an abatement, what remains after the deduction is the price of the article.) Hence, in the *firſt* caſe, the ſeller poſſeſſes a right to the original price, together with the increaſe ſuperadded to it; and, in the *ſecond* caſe, the purchaſer has a right to the original merchandiſe with the increaſe ſupperadded. *Shafeï* and *Ziffer* are both of opinion that ſuch increaſe is a mere act of *favour*, and therefore cannot be incorporated in the original ſale; for, if ſo, it muſt neceſſarily follow that a perſon gives his own property in exchange for his own property, ſince, previous to the *increaſe* of the price, the article was the property of the purchaſer in exchange for the original price; and, conſequently, if the increaſe be made in the price, the property of the purchaſer is given in exchange for what was before his property: in the ſame manner, alſo, in the *ſecond* caſe, as the price, previous to the increaſe, was the property of the ſeller,

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it follows that in increaſing the wares, he gives his own property in exchange for his own property.—Neither can an *abatement* from the price, by the ſeller, be incorporated with the original contract; but it muſt rather be conſidered as an act of *favour*; becauſe, prior to the abatement, an exchange of the merchandiſe for the whole of the price had taken place; and it is impoſſible to ſet aſide any part of the price, ſince in ſuch caſe it muſt follow that a part of the merchandiſe had no correſpondent exchange oppoſed to it; and this is unlawful.

OBJECTION.—This conſequence does not follow; becauſe the remaining ſum, after the deduction of the abatement, is conſidered as an exchange for the whole of the merchandiſe.

REPLY.—It is impoſſible to conſider the *remainder* as an exchange for the *whole*, becauſe no new contract has taken place with regard to the *diminiſhed* price, and the old contract relates only to the *full* price.

—The reaſoning of our doctors is, that the buyer and ſeller, by means of the increaſe and abatement, do only alter the contract from one lawful accident to another lawful accident; and that, as the parties poſſeſs the power of annulling the contract, they are, *a ſuperiori*, entitled to make an alteration in the non-eſſential properties of it. The caſe is therefore the ſame as if the parties ſhould annul an optional power, or ſtipulate one after the concluſion of the contract.—Now, ſince it is lawful for the parties to alter the accident of the contract by means of increaſe or abatement, it follows that ſuch increaſe or abatement is incorporated with the original contract; becauſe the accident of a thing adheres to that thing, and does not exiſt abſtractedly of itſelf. It is otherwiſe where a ſeller abates the *whole* price; for ſuch abatement could not be incorporated with the original contract, ſince in that caſe a change would take place in regard to what is an *eſſential property*, and not an *accident* of the contract.—It is alſo to be obſerved, that from the increaſe and abatement being incorporated with the original contract, it does not neceſſarily follow that a perſon gives his own property in exchange for his own property, becauſe the original contract does as it were relate to ſuch increaſe or abatement.—The advantage of the incorporation of the increaſe and the abatement in the original contract is evident, in a caſe of *friendly* or *profitable* ſale; for if a perſon ſell ſomething by a profitable ſale to a purchaſer who increaſes the price in the ſeller's favour, in that caſe it is lawful for him [the ſeller] to charge his profit on the original and the increaſe united; as, in caſe of an *abatement*, on the other hand, his profit muſt be charged on the reſidue after the deduction.—The advantage ariſing from this is alſo evident in a caſe of *Shaffa*; for the perſon poſſeſſing the right of *Shaffa* is entitled to the ſubject of the ſale, in caſe of an abatement in exchange for the diminiſhed price.

Objection.—Since the abatement and increaſe are incorporated with the original contract, it would follow that, in a caſe of *increaſe*, the perſon poſſeſſing the right of *Shaffa* is to take the ſubject of the ſale at the aggregate amount of the original price, and its increaſe,—inſtead of taking it (as is the caſe) at the *original* price only.

Reply.—In caſe of an increaſe of the price, the proprietor of the right of *Shaffa* takes the ſubject of the ſale at the original price only, becauſe his right relates to the original price, and it is not in the power of the buyer and ſeller, by any act of their's, to annul ſuch right.

The price
the deſtruction of the goods in the

Any increaſe of the price, after the deſtruction of the wares in the poſſeſſion of the purchaſer, is not valid, (according to the *Zâhir-Râwayet*,) becauſe of the wares not having been in a ſtate that admitted of the lawful oppoſition of an exchange for them.

Objection.—It would appear that the increaſe of the price remains in force *after* the deſtruction of the goods; for although the goods be not then in a ſtate to admit any exchange being oppoſed to them, yet the increaſe incorporates with the original contract, which was concluded at a time when, the goods being extant, it was lawful to oppoſe an addition to the exchange for them.

Reply.—If the wares had remained in a condition to admit of an exchange of property for them immediately, then ſuch exchange might have been immediately eſtabliſhed, and referred afterwards to the period of forming the contract; for a thing is firſt eſtabliſhed on the inſtant, and is then referred to the formation of the contract;—but as, in the preſent inſtance, the immediate exchange of the property cannot be eſtabliſhed, the wares no longer exiſting, the reference back is impoſſible; and hence any increaſe of the price is evidently invalid.—It is otherwiſe with reſpect to an abatement of the price after the deſtruction of the wares, becauſe theſe, after their deſtruction, are in a ſtate which admits of a diminution of the price; which is therefore referred to the formation of the contract.

ment may be commuted for a *diſtant* payment,

If a perſon, having ſold ſomething on condition of prompt payment, ſhould afterwards agree to receive the price at a future fixed period, it is lawful, becauſe the price is ſolely the right of the ſeller; and as it is in his power, if he chuſe, to forego it altogether, he is conſequently entitled, for the convenience and eaſe of the purchaſer, to take a *future* payment inſtead of a *prompt* one, *a fortiori.*—If the period ſtipulated be not certain, and the uncertainty be *very great*, (as if he ſhould ſtipulate payment *when the wind blows*, for inſtance,) it is not lawful. If the period, on the contrary, be only in a *ſmall degree* uncertain, (as if he ſhould ſtipulate the payment *at the cutting of the corn*, or *the threſhing* of it,) it is lawful, in the ſame manner as in the caſe of *bail*, of which an explanation has already been given.

in all debts except thoſe incurred by a

Every debt immediately due may be ſuſpended, in its obligation, to a future period, by the creditor, on the principles laid down in the preceding caſe,—excepting a *loan*[*], the ſuſpenſion of the obligation of which is not approved.—The reaſon of this is that the lending of money, is, in the immediate act, equivalent to a loan of any other thing †, and an act of benevolence; (whence it is that if a perſon ſhould tender a loan of money to another, expreſſing his intention by the word *Areeat*,—as if he ſhould ſay, "I deliver theſe ten *dirms* as "an *Areeat*,"—it is valid; and alſo, that no perſon who is incapable of any gratuitous act, ſuch as an *infant* or a *lunatic*, is competent to this deed:)—but in the end it operates as an *exchange*, ſince the borrower gives to the lender an *equal ſum*, but not the identical ſpecie he received.—In conſideration, therefore, of the *immediate act*, a reſpite is not binding upon the lender, as there can be no conſtraint in an act purely gratuitous; and, in conſideration of the *end*, the reſpite is not approved, for in this caſe the tranſaction would reſolve itſelf into a ſale of money for money, which is *uſury*.—It is otherwiſe, in the *bequeſt* of a loan for a fixed period; for if a perſon bequeath the loan of one thouſand *dirms* to another, for a year, (for inſtance,) the performance of this is incumbent on the executor; nor is he entitled to make any demand on the legatee until the expiration of the term, ſince this bequeſt is of a *gratuitous* nature, and reſembles the bequeſt of the ſervices of a ſlave, or the uſe of a houſe.

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[*] Arab. *Karz*; ſignifying a loan of *money*, in oppoſition to *Areeat*, which means a loan of any thing but money. Theſe deeds are conſidered, by *Muſſulmans*, to be of a

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diſtinct and ſeparate nature. In the one the intention is to deſtroy the ſubſtance of what is borrowed, that is, to ſpend the identical money received, and afterwards return an equal number of ſimilars. In the other, the intention is to enjoy the uſufruct without injuring the ſubſtance, which is to be returned in its identical ſtate.

† Literally, "*a* KARZ *is, in its immediate occurrence, equivalent to an* AREEAT."

CHAP.

CHAP. VIII.

Of *Ribba*, or *Uſury*.

Definition of the term.

RIBBA, in the language of the LAW, ſignifies an exceſs, according to a legal ſtandard of meaſurement or weight, in one of two homogeneous articles [of weight or meaſurement of capacity] oppoſed to each other in a contract of exchange, and in which ſuch exceſs is ſtipulated as an obligatory condition on one of the parties, without any return,—that is, without any thing being oppoſed to it. The ſale, therefore, of two loads of *barley* (for inſtance) in exchange for one load of wheat does not conſtitute uſury, ſince theſe articles are not homogeneous:—and, on the other hand, the ſale of ten yards of *Herât* cloth in exchange for five yards of *Herât* cloth is not uſury, ſince, although theſe articles be homogeneous, ſtill they are not eſtimable by weight or meaſurement of capacity.

Uſury (occa ſioned by rat … is un-

USURY is unlawful; and (according to our doctors) is occaſioned by *rate*[*], united with *ſpecies*.—*Shafeï* maintains that uſury takes place only in things of an *eſculent* nature, or in *money*.—It is neceſſary, in order to the operation of the illegality, that the articles be homogeneous; but an equality in point of weight or meaſurement of capacity annihilates the uſury.—It is to be obſerved that a ſuperiority or inferiority in the *quality* has no effect in the eſtabliſhment of the uſury;

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[*] It may be neceſſary here to obſerve that *rate*, amongſt the *Muſſulmans*, applies only to articles of weight or meaſurement of capacity, and not to articles of *longitudinal* meaſurement, ſuch as *cloth*, or the like.—The phraſe here uſed implies *an inequality of* RATE *with a ſimilarity of* SPECIES.

and hence it is lawful to ſell a quantity of the *better* ſort of any article in exchange for an equal quantity of an *inferior* ſort.

It conſiſts in the ſale of an article (of weight or meaſurement of capacity) in exchange for an unequal quantity of the ſame article;

The ſale, at an unequal rate, of articles of weight or meaſurement of capacity, in exchange for homogeneous articles, is uſurious, according to our doctors, although the articles be of a deſcription not *eſculent*, (ſuch as *loam* or *iron*, for inſtance;)—becauſe they hold that the *cauſe* of uſury exiſts, in articles of weight and meaſurement of capacity, although they be not of an eſculent nature. *Shafeï* maintains that ſuch ſale is lawful, agreeably to his tenets with reſpect to uſury. Suppoſing, however, the equality of the rate, ſuch ſale is lawful in the opinion of all the doctors.—(It is to be obſerved that *loam* is an article of meaſurement by *capacity*, and iron of *weight*.)

but does not exiſt where the quantities are not aſcertained by ſome known ſtandard of meaſurement.

The ſale of any thing not meaſured out according to the legal ſtandard, at an unequal rate, is lawful. Thus it is lawful to ſell one handful of wheat in exchange for two handfuls; or two handfuls in exchange for four;—and alſo, *one* apple in exchange for *two* apples; becauſe, in ſuch caſe, the meaſurement not having been made according to a legal ſtandard, it follows that a ſuperiority of meaſurement (which is eſſential to the eſtabliſhment of uſury) has not, according to the rules of meaſurement, taken place. *Shafeï* maintains that ſuch ſale is unlawful; becauſe the article is, in this inſtance, of an *eſculent* nature, which (according to his tenets) is the efficient cauſe of uſury; and alſo becauſe the equality deſtructive of uſury does not here exiſt. (It is to be obſerved that whatever is leſs than half of a *Saâ* is conſidered equivalent to an handful, ſince the law has fixed no ſtandard of meaſure beneath that quantity.)

It is occaſioned either by an inequality in point of quantity, or by a ſuſpen-

Where the quality of being *weighable* or *meaſurable* by *capacity*, and correſpondence of *ſpecies* (being the cauſes of uſury) both exiſt, the ſtipulation of inequality, or of a ſuſpenſion of payment to a future period, are both uſurious. Thus it is uſurious to ſell either *one* meaſure ſion of repayment; unleſs the

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ſure of wheat in exchange for *two* meaſures,—or one meaſure of wheat for one meaſure deliverable at a future period. If, on the contrary, neither of theſe circumſtances exiſt, (as in the ſale of wheat for money,) it is lawful either to ſtipulate a ſuperiority of rate, or the payment at a future period. If, on the other hand, *one* of theſe circumſtances only exiſt, (as in the ſale of *wheat* for *barley*, or the ſale of one ſlave for another,) then a ſuperiority in the *rate* may legally be ſtipulated, but not a ſuſpenſion in the payment. Thus one meaſure of wheat may lawfully be ſold for two meaſures of barley, or one ſlave for two ſlaves: but it is not lawful to ſell one meaſure of wheat for one meaſure of barley payable at a future period; nor one ſlave for another, deliverable at a future period. *Shafëi* is of opinion that *correſpondence of ſpecies* alone does not render illegal a ſuſpenſion of delivery; becauſe where, in an exchange, a prompt delivery is oppoſed to a future delivery, there is only a *ſemblance* of a ſuperiority of rate, founded on the preference given to prompt payment. Now if a ſuperiority of rate, in *reality*, be not preventive of the legality of the ſale (as in the caſe of one ſlave for two ſlaves) it follows that the *ſemblance* only of a ſuperiority is not preventive of ſuch legality, *a fortiori.* The arguments of our doctors are, that wherever either correſpondence of ſpecies, or the quality of being weighable or meaſurable exiſts, the wares are, in one ſhape, of that deſcription in which uſury takes place; and accordingly, a *ſemblance* of uſury takes place in them, which is repugnant to the legality of the ſale in the ſame manner as *actual* uſury. The ground of this is what is written in the *Hadees Shireef*, that "articles of different ſpecies may be ſold in "any manner the parties pleaſe, provided the bargain be from hand "to hand."

OBJECTION.—Since correſpondence of ſpecies, or the quality of being weighable or meaſurable does either of them ſingly prevent the legality of a ſuſpenſion of delivery, it would follow that a contract of *Sillim* ſale ſtipulating an exchange of ſaffron for *dirms* or *deenars*, is invalid, as both are articles of *weight*:—whereas ſuch a ſale is valid.

and hence it is lawful to ſell a quantity of the *better* ſort of any article in exchange for an equal quantity of an *inferior* ſort.

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but does not exiſt where the quantities are not aſcertained by ſome known ſtandard of meaſurement.

The ſale of any thing not meaſured out according to the legal ſtandard, at an unequal rate, is lawful. Thus it is lawful to ſell one handful of wheat in exchange for two handfuls; or two handfuls in exchange for four;—and alſo, *one* apple in exchange for *two* apples; becauſe, in ſuch caſe, the meaſurement not having been made according to a legal ſtandard, it follows that a ſuperiority of meaſurement (which is eſſential to the eſtabliſhment of uſury) has not, according to the rules of meaſurement, taken place. *Shafeï* maintains that ſuch ſale is unlawful; becauſe the article is, in this inſtance, of an *eſculent* nature, which (according to his tenets) is the efficient cauſe of uſury; and alſo becauſe the equality deſtructive of uſury does not here exiſt. (It is to be obſerved that whatever is leſs than half of a *Saâ* is conſidered equivalent to an handful, ſince the law has fixed no ſtandard of meaſure beneath that quantity.)

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neous.

ſure of wheat in exchange for *two* meaſures,—or one meaſure of wheat for one meaſure deliverable at a future period. If, on the contrary, neither of theſe circumſtances exiſt, (as in the ſale of wheat for money,) it is lawful either to ſtipulate a ſuperiority of rate, or the payment at a future period. If, on the other hand, *one* of theſe circumſtances only exiſt, (as in the ſale of *wheat* for *barley*, or the ſale of one ſlave for another,) then a ſuperiority in the *rate* may legally be ſtipulated, but not a ſuſpenſion in the payment. Thus one meaſure of wheat may lawfully be ſold for two meaſures of barley, or one ſlave for two ſlaves: but it is not lawful to ſell one meaſure of wheat for one meaſure of barley payable at a future period; nor one ſlave for another, deliverable at a future period. *Shafeï* is of opinion that *correſpondence of ſpecies* alone does not render illegal a ſuſpenſion of delivery; becauſe where, in an exchange, a prompt delivery is oppoſed to a future delivery, there is only a *ſemblance* of a ſuperiority of rate, founded on the preference given to prompt payment. Now if a ſuperiority of rate, in *reality*, be not preventive of the legality of the ſale (as in the caſe of one ſlave for two ſlaves) it follows that the *ſemblance* only of a ſuperiority is not preventive of ſuch legality, *a fortiori*. The arguments of our doctors are, that wherever either correſpondence of ſpecies, or the quality of being weighable or meaſurable exiſts, the wares are, in one ſhape, of that deſcription in which uſury takes place; and accordingly, a *ſemblance* of uſury takes place in them, which is repugnant to the legality of the ſale in the ſame manner as *actual* uſury. The ground of this is what is written in the *Hadees Shireef*, that "articles of different ſpecies may be ſold in "any manner the parties pleaſe, provided the bargain be from hand "to hand."

Objection.—Since correſpondence of ſpecies, or the quality of being weighable or meaſurable does either of them ſingly prevent the legality of a ſuſpenſion of delivery, it would follow that a contract of *Sillim* ſale ſtipulating an exchange of ſaffron for *dirms* or *deenars*, is invalid, as both are articles of *weight*:—whereas ſuch a ſale is valid.

Reply.—The contract is lawful, notwithſtanding ſaffron and *deenars* be both articles of weight, becauſe they do not agree in the *quality* of the weight, as ſaffron is weighed by *Mâns*, and being a ſubject of *ſale* only, is therefore definite by ſpecification; whereas *dirms* and *deenars* are weighed by *ſtones*, being only *price* and not a *ſubject* of ſale; and therefore do not become definite by ſpecification. In the ſame manner, alſo, if a perſon ſhould ſell ſaffron to another for one hundred *dirms*, ready money, that other may lawfully employ the ſaid *dirms* either in purchaſe or in any other mode without reweighing them:—whereas, if a perſon ſell ſaffron, on condition of its being two *Mâns*, the purchaſer is not afterwards at liberty to diſpoſe of it by ſale or by any other mode without reweighing it; as holds with reſpect to all articles of weight or meaſurement of capacity. Now it being thus demonſtrated that the weight of ſaffron and other articles is different from the weight of *dirms* and *deenars*, in appearance, ſubſtance, and effect, it follows that they do not unite in any circumſtance with reſpect to the quality of the weight; and conſequently, that the ſemblance of uſury, in this caſe, is only an *apprehenſion* of a ſemblance, which is not regarded.

All articles ordained by the prophet to be articles of meaſurement, continue ſo, notwithſtanding any alterations of cuſtom;—and the ſame of all ordained by him to be articles of *weight*.

Every thing in which the uſuriouſneſs of an exceſs has been eſtabliſhed by the prophet on the ground of *meaſurement of capacity*, (ſuch as *wheat*, *barley*, *dates*, and *ſalt*,) is for ever to be conſidered as of that nature, although mankind ſhould forſake this mode of eſtimation;—and in the ſame manner, every thing in which the uſuriouſneſs of the exceſs has been eſtabliſhed by the prophet on the ground of *weight*, continues for ever to be conſidered as an article of weight, like *gold* or *ſilver*; becauſe the cuſtom of mankind, which regulates the mode of meaſurement, is of inferior force to the declaration of the prophet; and a ſuperior cannot yield to an inferior. (*Aboo Yooſaf* is of opinion that in all things practice or cuſtom ought to prevail, although in oppoſition to the ordinance of the prophet; for the ordinance of the prophet was founded on the uſage and practice of his own time:—in ordinances, therefore, the prevalent cuſtoms among mankind are to be regarded; and as theſe are liable to alter, they muſt be attended to, rather than the *letter* of an ordinance.) If, therefore, a perſon ſhould ſell *wheat* in exchange for an equal quantity, by *weight*, or *gold* in exchange for an equal quantity, by a meaſurement of *capacity*, neither of theſe ſales would be lawful, (according to *Haneefa* and *Mohammed*,) although theſe modes of weighing wheat and meaſuring gold ſhould become ſanctified by the cuſtom of mankind.

All articles ſtandard of weight are conſidered a

WHATEVER is referred to *Ratls* is conſidered as an article of *weight*. This the compiler of the *Hedaya* explains to mean that whatever is ſold by the *Awkiyat** muſt be conſidered as an article of weight; for an *Awkiyat* is a fixed ſtandard of weight in oppoſition to all other meaſures of capacity, as none elſe are ſtandards of weight. Now as every thing ſold by the *Awkiyat* comes under the deſcription of an article of *weight*, it follows that if this thing be ſold by the meaſurement of any other veſſel not of a fixed ſtandard of weight, oppoſed to a ſimilar veſſel, ſuch ſale is unlawful, becauſe of the probability of a diſparity of weight, notwithſtanding the equality in point of meaſurement of capacity; for this, in fact, is the ſame as if one perſon ſhould ſell one article of weight in exchange for another of the ſame kind and adjuſt the quantity by conjecture.

Note concerning *Sirf* ſale.

IT is to be obſerved that a *Sirf* ſale means the ſale of price in exchange for price; and price implies *dirms* and *deenars*. In this mode of ſale it is a neceſſary condition that the interchange of properties take place at the meeting, becauſe the prophet has ordained the ſale of ſilver in exchange for ſilver, from hand to hand,—as ſhall be explained at large in treating of *Sillim* ſales: but in every *other* article, provided it be of that kind in which uſury takes place (ſuch as

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* This term has been formerly mentioned to ſignify an ounce. (See Vol. I. p. 24.) From the context, however, it would appear that it alſo ſignifies a meaſure of capacity.

wheat in exchange for *wheat*, for inſtance,) the interchange upon the ſpot is not a condition, it being only required that the article be *ſpecific*. *Shafeï* maintains that in the ſale of wheat for wheat mutual ſeizin is a condition, becauſe of the ordinance of the prophet, "*Sell it from hand to hand*;" and alſo becauſe, if one party ſhould make ſeizin, and not the other, it follows that an appearance of uſury takes place, inaſmuch as *prompt* payment is ſuperior to *future* payment. Our doctors argue that wheat, as being a determinate ſubject of ſale, does not, like cloth, ſtand in need of ſeizin, ſince the object of the contract is the attainment of a power over the article, which is fully eſtabliſhed by its being determinate. It is otherwiſe with reſpect to *Sirf* ſales, for there the ſeizin is made a condition in order that the price and ſubject of the ſale may be rendered determinate, which is only to be effected by means of ſeizin. With reſpect to the ordinance of the prophet, enjoining the ſale from hand to hand, *Obádah Bin Sámat*, has explained it to mean the ſale of one determinate thing in exchange for another. Beſides, on the poſtponement of the ſeizin, no loſs is reckoned to reſult, in the opinion of mankind:—contrary to where a prompt and future payment is ſtipulated; becauſe the latter in the opinion of mankind is a detriment.

Similars ſold

THE ſale of one egg in exchange for two eggs, from hand to hand, is lawful; and the ſame with reſpect to dates and walnuts; becauſe theſe articles are neither ſubject to meaſurement of capacity or weight, with regard to which only uſury relates. *Shafeï*, in this caſe, differs from our doctors; becauſe uſury, according to his opinion, relates to articles of an *eſculent* nature, of which kind theſe are.

with reſpect to *Faloos*, as they are articles of *ſale*.

ſale of one ſpecific *Faloos* *, in exchange for two other ſpecific *Faloos*, is valid, according to *Haneefa*. *Mohammed* maintains it to be unlawful; becauſe, as the fitneſs to conſtitute *price* is eſtabliſhed in *Faloos*, with the conſent of mankind, it cannot be annulled by any agreement of a ſeller and purchaſer counter thereto; and as the fitneſs to conſtitute price ſtill continues, the *Faloos* cannot be rendered determinate by means of a ſtipulation to that effect in the contract. The caſe, therefore, becomes the ſame as if a perſon ſhould ſell one undeterminate *Faloos* in exchange for two undeterminate;—or, as if a perſon ſhould ſell one *dirm* in exchange for two. The reaſoning of the two diſciples is that this fitneſs to conſtitute *price* in *Faloos* cannot ſubſiſt with relation to a buyer and ſeller, unleſs by their mutual agreement to that effect*; and, conſequently, where they agree to the contrary, the fitneſs to repreſent price is, with reſpect to them, null; nor can the general conſent of others, to admit *Faloos* as a repreſentative of price, operate as an argument with reſpect to them, ſince in this matter others have no power over them. Hence it follows that, as the fitneſs to conſtitute price is, with reſpect to them, null, the *Faloos* may be identified by their ſpecification.

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* A copper coin. (See Vol. II. p. 305.)

OBJECTION.—Upon the fitneſs to conſtitute price being done away by the agreement of the parties, the *Faloos* will of conſequence revert to their primary nature, namely *weight*, (for the *Faloos* was originally a *weight*.)—It would therefore follow that the ſale of one *Faloos* for two *Faloos* is not valid, although the fitneſs to conſtitute price be done away by the agreement of the contracting parties.

REPLY.—The *Faloos* do not revert to their original nature, becauſe, by the agreement of mankind, they are conſidered as articles of *tale*, and this agreement remains in force. Hence they ſtand in the ſame predicament as *walnuts*, or other articles of *tale*, and the unequal ſale of them is of conſequence in the ſame manner lawful.—It is otherwiſe with reſpect to *dirms* and *deenars*, becauſe theſe *naturally* conſtitute price.—It is alſo otherwiſe with reſpect to the ſale of one undeterminate *Faloos* in exchange for two undeterminate *Fa-*

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* That is to ſay, copper coins are not to be conſidered as *price* but by a previous agreement of the parties.

loos; for this is, in fact, a ſtipulation of future payment and future delivery, a ſpecies of ſale which has been forbidden by the prophet.—It is alſo otherwiſe where the ſtipulation of *one* of the parties relates to undeterminate *Faloos*, for this is equivalent to a poſtponement of payment, and ſuch poſtponement is rendered unlawful by homogeneity alone.

cannot be ſold for wheat.

The ſale of wheat in exchange for the *flour* or *meal* of wheat is unlawful, becauſe wheat, and the meal and flour of it, are all of one ſpecies.—It is impoſſible, moreover, to aſcertain the equality between thoſe articles by meaſurement, ſince flour and meal are of a *cloſe* and *compact* nature, and wheat is not. Hence this kind of ſale is eſſentially invalid, even in the exchange of one meaſure of the one for one meaſure of the other.

Flour may be ſold for *flour*,

The ſale of flour in exchange for flour is valid, provided the quantities be equal by meaſurement, becauſe the condition of legality (namely, *equality*) is here eſtabliſhed.

but not for *meal*.

The ſale of flour in exchange for meal * is not valid, according to *Haneefa*, in any mode; neither at an *equal*, nor at an *unequal* rate; for as it is not lawful to ſell flour in exchange for *parched* wheat, or meal in exchange for *raw* wheat, ſo alſo it is not lawful to ſell either of thoſe articles for the other, becauſe of their homogeneity.—According to the two diſciples the ſale in queſtion is lawful; becauſe flour and meal are of different ſpecies, in as much as the *object* to be derived from each is different; for the object of flour is *bread*, and that of meal is a culinary preparation, mixed up with water or oil.—But the anſwer to this is that the original object of both is the ſame, namely, *food*; which is not affected in its nature by the modification of it, ſince *raw* wheat and *parched* wheat are conſidered as of ſame ſpecies, and likewiſe wheat affected by vermin and wheat that is whole and preſerved,—although, in anſwering particular objects, theſe kinds be different.

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* Arab. *Saveek*. A ſort of coarſe meal prepared either from *wheat* or *barley*.—Alſo, what remains after ſifting off the fine flour.

The ſale of *fleſh* for a *living animal* is not uſurious;

THE ſale of fleſh in exchange for a living animal is lawful, according to *Haneefa* and *Aboo Yooſaf*. *Mohammed* is of opinion that the ſale of fleſh in exchange for a living animal of the ſame ſpecies is unlawful, unleſs the quantity of the dead fleſh exceed that of the living fleſh, in order that the exceſs may be oppoſed in exchange to the other parts of the living animal, independant of fleſh; and the remaining part of the ſlain fleſh remain oppoſed in an equal degree to the living fleſh; becauſe otherwiſe uſury muſt neceſſarily take place, ſince, if the quantities of fleſh were exactly equal, it muſt neceſſarily follow that the other parts of the living animal had no exchange oppoſed to them;—or if, the quantities of fleſh being equal, a deduction be made from the dead fleſh, in oppoſition to the other parts of the living animal, it would neceſſarily create an inequality in the exchange of fleſh for fleſh. The ſale in queſtion, therefore, reſembles a ſale of ſeſamé ſeed in exchange for ſeſamé oil, which is unlawful. The arguments of the two diſciples in ſupport of their opinion is, that the caſe in queſtion is in fact the ſale of an article of weight for what is *not* an article of weight; ſince it is not cuſtomary to weigh living animals, it being indeed impracticable to aſcertain their weight, as they are not at all times of equal weight, an animal being lighter when hungry, and heavier when filled with food.—It is otherwiſe with oil-ſeeds, as by weighing thoſe may at once be aſcertained the quantity of oil contained in them when ſeparated from the dregs or refuſe.

nor the ſale of
freſh dates for

THE ſale of freſh dates in exchange for dried ones is lawful, according to *Haneefa*. The two diſciples hold a different opinion, becauſe of a tradition, in which it is mentioned that a perſon having interrogated the prophet regarding the legality of ſuch ſale, the prophet, in return, deſired to know whether freſh dates did not diminiſh in drying?—and upon that perſon anſwering in the affirmative, he declared that, ſuch being the caſe, the ſale of freſh dates in exchange for dry ones was not lawful. The arguments of *Haneefa* in ſupport of his opinion are twofold:—FIRST, the word *Tammir*, expreſſive of *dry* dates, is alſo applicable to *freſh* dates, becauſe there is a tradition that a perſon brought ſome freſh dates from *Kheebir* to the prophet, who, on their being preſented to him, inquired if all the *Tammir* of *Kheebir* were of that kind? and as freſh and dry dates are from this circumſtance held to be of the ſame kind, it follows that the ſale of the one in exchange for the other, on condition of an equality in the rate, is lawful, ſince the prophet has ſaid, "*Sell* TAMMIRS *in* "*exchange for* TAMMIRS, *at an equal rate.*—SECONDLY, if it be not admitted that freſh dates fall under the appellation of *Tammir*, ſtill the ſale is lawful, becauſe of another ſaying of the prophet, "*When* "*two things are of different ſpecies, then let them be ſold in whatever* "*manner the parties pleaſe.*" In regard to the ſaying quoted by the two diſciples, it reſts entirely on the authority of *Zeyd Ibn Abbas*, which is conſidered weak among the traditioniſts.—It is to be obſerved that the ſame diſagreement ſubſiſts with reſpect to the ſale of dried and freſh *grapes*, founded on the ſame arguments as thoſe already cited. Some have aſſerted that the ſale of *dried* grapes in exchange for *freſh* is unlawful, according to all our doctors, grounding this aſſertion on the analogy which ſubſiſts between this caſe and that of parched and raw wheat, the ſale of which in exchange for each other is univerſally declared to be invalid.

THE ſale of freſh dates in exchange for freſh dates, at an equal rate in point of meaſurement of capacity, is lawful, in the opinion of all our doctors *.

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* The remainder of this caſe, which is of conſiderable length, as well as the complete ſucceeding caſe, has been omitted in the tranſlation, becauſe the diſputations contained in them are founded entirely on verbal criticiſms, which do not admit of an intelligible tranſlation.

THE ſale of olives in exchange for *oil* of olives is unlawful, excepting when the actual oil is greater in quantity than the oil contained within the olives, in which caſe the exceſs being oppoſed to the dregs that will neceſſarily remain after the expreſſion of the oil, prevents the eſtabliſhment of uſury.—The law is the ſame with reſpect to the ſale of walnuts for the oil of walnuts, of ſeſamé ſeeds for the oil of ſeſamé, of milk for butter, or of the juice of the grape or dates in exchange for grapes or dates. With reſpect to the ſale of cotton in exchange for the thread of it there is a difference of opinion. The ſale of cotton, however, in exchange for callico is univerſally allowed to be legal.

The ſale of the manufactured produce of an article in exchange for a ſimilar article, is uſurious, unleſs it exceed that article in quantity.

IT is lawful to ſell one ſpecies of fleſh, in any manner, in exchange for another ſpecies of fleſh, (ſuch as the fleſh of a *cow* for that of a *camel* or a *goat*.) It is to be obſerved that the fleſh of a cow and of a buffalo are of the ſame ſpecies, as is alſo the fleſh of a ſheep and that of a

One ſpecies of fleſh may be ſold for another ſpecies.

THE milk of a cow and of a goat are of different kinds, and may therefore be lawfully ſold in exchange for each other at unequal rates. It is related, as an opinion of *Shafeï*, that theſe are of the ſame kind, becauſe the object to be derived from each is the ſame. But our doctors argue that the fleſh of theſe animals is evidently of a different kind, ſince it would not be lawful for a perſon, on whom the gift of a cow in alms was enjoined, to ſubſtitute a goat in lieu of a cow, if it prove defective; the milk of theſe animals, therefore, differs in point of ſpecies in the ſame manner as their fleſh. It is to be obſerved that the vinegar of *dates* is of a different kind from the vinegar of *grapes*, becauſe of the difference of their originals. So alſo, the wool of a *ſheep* is of a different kind from that of a *goat*, becauſe they anſwer different objects.

The ſale of the milk of on
for an unequal quantity of milk
uſury.

Bread may be ſold for flour at an unequal rate.

It is lawful to ſell bread made of wheat in exchange for wheat, or the flour of wheat, at an unequal weight, becauſe bread is conſidered either as an article of tale or of weight, and conſequently is of a different kind from wheat or flour, which are ſubject to meaſurement of capacity.—It is related as an opinion of *Haneefa*, that ſuch ſale is utterly invalid; but decrees paſs according to the firſt adjudication, and this, whether the delivery of either the wheat or the bread be ſtipulated to take place at a future period. According to *Haneefa* the borrowing of bread is utterly unlawful,—that is, whether it be conſidered as an article of tale or weight,—becauſe there is great difference with reſpect to cakes of bread, either in reſpect to themſelves, or the workmanſhip of the baker. According to *Mohammed* it is abſolutely legal; that is, whether the bread be conſidered as an article of *tale* or *weight*. According to *Aboo Yooſaf* it is lawful, if conſidered as an article of *weight*; but not if conſidered as an article of *tale*, becauſe of the difference of the unities.

Uſury cannot take place between a maſter and his ſlave,

Usury cannot take place between a maſter and his ſlave, becauſe whatever is in the poſſeſſion of the ſlave is the property of the maſter, ſo that no ſale can poſſibly take place between them, and hence the impoſſibility of uſury.—This proceeds upon a ſuppoſition of the ſlave being *privileged* and *free from debt*; for in the caſe of a privileged ſlave who is inſolvent, uſury may take place between him and his maſter, according to *Haneefa*, becauſe (agreeably to his tenets) the poſſeſſions of ſuch ſlave do not belong to the maſter;—and according to the two diſciples, becauſe although (agreeably to their tenets) the poſſeſſions of ſuch ſlave be the property of his maſter, ſtill as the claims of the creditors are connected with them, the ſlave ſtands in the ſame relation to his maſter as a ſtranger, and conſequently uſury may exiſt in their dealings.

unleſs the ſlave be an *Ma-*

nor between a *Muſſulman*

Usury cannot take place between a *Muſſulman* and a hoſtile infidel,

fidel, in a hoſtile country.—This is contrary to the opinion of *Aboo Yooſaf* and *Shafeï*, who conceive an analogy between the caſe in queſtion and that of a protected alien within the *Muſſulman* territory. The arguments of our doctors upon this point are twofold. First, the prophet has ſaid, “ *There is no uſury between a* Mussulman *and a hoſtile infidel, in a foreign land.*”—Secondly, the property of a hoſtile infidel being free to the *Muſſulmans*, it follows that it is lawful to take it by whatever mode may be poſſible, provided there be no *deceit* uſed.—It is otherwiſe with reſpect to a protected alien, as *his* property is not of a neutral nature, but ſacred, becauſe of the protection that has been afforded to him.

and infidel in a hoſtile country.

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CHAP. IX.

Of *Rights* and *Appendages*.

The *rights* of a ſale are things eſſentially neceſſary to the uſe of the ſubject of the ſale, ſuch as, in the purchaſe of a houſe, the right of paſſing through the road that leads to it; or, in the purchaſe of a well, the right of drawing water from it.—*Appendages* imply things from which an advantage is derived, but in a ſubordinate degree, ſuch as a *cook-room*, or a *drain*.

Definition of

with *ſale*.

If a perſon purchaſe a *Manzil* above which there is another *Manzil*, he is not entitled to the upper *Manzil*, unleſs he have ſtipulated the purchaſe of the *Manzil* “ with all its rights, and all its append-

Difference of

a *Dár*, and a *Bait*.

"ages,"—or, "with every thing great and ſmall upon it, in it, or "of it."—If, on the other hand, a perſon purchaſe a *Bait* above which there is another *Bait*, with a ſtipulation of all its rights, ſtill he is not entitled to the upper *Bait*. But if a perſon purchaſe a *Dár* (that is, a *ſerai*) with its encloſure, he is entitled to the upper ſtories and the offices; becauſe the term *Dár* ſignifies a place comprehended within an encloſure, which is conſidered as the original ſubject, and of which the *upper* ſtory is a dependant part. *Bait*, on the contrary, ſimply ſignifies any place of *reſidence*; and as the *upper* ſtory of a houſe is of this nature as well as the under, it cannot be included in the purchaſe of a *Bait*, unleſs by an expreſs ſpecification, ſince a thing cannot be a dependant of its fellow. A *Manzil*, on the other hand, is a mean;—that is, it is greater than a *Bait*, and ſmaller than a *Dár*;—for although it comprehends every thing neceſſary to a dwelling-place, ſtill it is deficient in having no place for cattle: a *Manzil*, therefore, is in one reſpect ſimilar to a *Dár*, and in another reſpect ſimilar to a *Bait*; and hence, from its ſimilarity to a *Dár*, the upper houſe is included in virtue of its being a ſubordinate part, whenever a ſpecification of the rights is made; and, from its ſimilarity to a *Bait*, the upper houſe is not included in the ſale, unleſs a ſpecification of the rights be made.—Some have ſaid that, in the practice of the preſent age, the upper houſe is neceſſarily included in all the above caſes; becauſe a *Bait* (which means a *houſe* in the *Perſian* language) does neceſſarily include the upper ſtory.

A porch over a road, connected with a houſe, is not included in the ſale of it, unleſs it be e-

A PORCH over a road, of which the beams in one end are laid upon a *Dár* [or *houſe*] which is the ſubject of a ſale, and in the other end upon the oppoſite houſe, or upon a pillar, is not included in the ſale of the houſe, unleſs a ſpecification of rights be made in the ſale; becauſe the porch covering the road is held to be of the ſame nature as a road.—The two diſciples have obſerved that if the ſaid porch ſhould form the entrance into the houſe, it is then virtually included in the ſale.

If a perſon purchaſe a room [*Bait*] in a houſe [*Dár*] or dwelling-place [*Manzil*,] he is not entitled to the uſe of the road, unleſs he have ſtipulated the rights and appendages, or the *great* and *ſmall* belonging to it.—In the ſame manner, in the ſale of land, a well or drain is not included, unleſs by a ſpecification of the rights or appendages; becauſe they are *not* conſidered as a part of the ground, but as a *dependant* on it.—It is otherwiſe with reſpect to a *leaſe*, for *that* virtually includes the well and road without any ſpecification, becauſe the object of a leaſe is an uſufruct, which is not to be obtained but by the uſe of the road and well; and it is not a cuſtom amongſt farmers to rent a *road* or a *well*. But the object of a ſale may be anſwered without the neceſſity of including the *road* or *well*, ſince it is cuſtomary, amongſt purchaſers, to ſell and trade with the ſubjects of their purchaſe, and to diſpoſe of them into the hands of another; whence an advantage is derived from the tranſaction, without the road or other appendage being included.

The avenue is not included in the purchaſe of an apartment of a houſe,—nor wells or drains in the purchaſe of lands,

preſſed in the contract.

CHAP. X.

Of *Claim* of *Right* (preferred by other to the Subject of a Sale)

If a female ſlave, being ſold, bring forth a child whilſt in the purchaſer's poſſeſſion, and another perſon afterwards eſtabliſh, by witneſſes, that ſhe was originally his property, and had not belonged to the ſeller, ſuch perſon is entitled to the female ſlave, and alſo to the child.

female

after having produced a child whilſt in the purchaſer's poſ-ſeſſion, is, together with

the claimant, provided the claim be eſta-

by

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but if the claim be ſupported by the

only, the child is not his property.

child.—If, however, the proof be eſtabliſhed by the acknowledgment of the purchaſer, the claimant is in this caſe entitled to the female ſlave only, unleſs he alſo ſpecifically include the child in the claim, in which caſe the acknowledgment of the purchaſer entitles him to both. The diſtinction between a caſe of evidence and a caſe of acknowledgment is, that teſtimony is abſolute proof, being adapted for the elucidation of the fact. By evidence, therefore, it is manifeſted that the ſlave belonged to the claimant *ab initio*, that is to ſay, from a time *prior* to the purchaſe of her; and as, at that period, the child was a dependant part of her, (ſince it had not iſſued from the womb,) it follows that the claimant has a right to it as well as the mother.—*Acknowledgment*, on the contrary, is *defective* proof, ſince it eſtabliſhes the right of property of the thing claimed in the claimant, purely from the neceſſity of verifying acknowledgment; becauſe an acknowledgment is a declaration; and if the eſtabliſhment of the right of property did not in any degree take place, the declaration muſt of courſe be falſe.—Now this conſequence may be prevented by the eſtabliſhment of the right of property at the time of the acknowledgment; and the child, at that period, not being a dependant part, as having iſſued from the womb, is therefore not included in the property of the claimant.—Some have ſaid that, in caſe of the eſtabliſhment by teſtimony, when the *Kâzee* iſſues his decree for the claimant to take the ſlave, the child, from its dependance, is virtually included; and that there is no neceſſity for a ſpecification of it in the decree. Others, again, have ſaid that the ſpecification of the child is an abſolutely neceſſary condition, of which the adjudication in ſeveral analogous caſes is a clear proof. Thus *Mohammed* has declared that where the *Kâzee* decrees the original to any perſon, without having any knowledge of the ſubordinate parts, ſuch ſubordinate parts are not comprehended in the decree. Where, alſo, in a caſe of a claim of right to a female ſlave, purchaſed by another, the *Kâzee* decrees the ſlave to the claimant, and it ſo happens that the child ſhe has brought forth is in the hands of ſome other perſon than the purchaſer, ſuch child is not comprehended in the decree.

A perſon ſelling another as a *ſlave*, who afterwards proves to be free, muſt reſtore the purchaſed ſlave excited the purchaſer to the bargain, *he* muſt reſtore it in defect of the *ſeller*.

IF a perſon purchaſe a ſlave, and the ſlave afterwards prove by witneſſes that he is free, notwithſtanding that, at the time of concluding the contract, he had ſaid to the purchaſer " purchaſe me, " for I am a ſlave,"—and the ſeller be preſent, or *abſent* at a place that is known, the purchaſer is entitled to recover the price from him: but if the ſeller be abſent, and the place of his ſojournment unknown, the purchaſer is in that caſe entitled to take the price from the ſlave, who is to recover the ſame from the ſeller whenever it may be in his power.—If, on the contrary, a perſon accept of a ſlave in *pawn*, on the ground of the ſlave ſaying to him, " accept of me in pawn, for " I am a ſlave," and it afterwards appear that he is free, the pawnee is not in that caſe at liberty to take payment from the ſlave of the ſum due to him, whether the pawner be abſent or preſent, but muſt at all events ſeek it from the pawner. *Aboo Yooſaf* holds that the ſame rule alſo obtains in the caſe of *ſale*,—that is, that the purchaſer has no right, under any circumſtances, to an indemnification from the ſlave, becauſe he has no right to take the price from any but the ſeller, or his ſecurity,—and the ſlave is neither of theſe, but merely a *liar*, which does not ſuperinduce reſponſibility.—The argument of the two diſciples is that, in the caſe in queſtion, the purchaſer engaged in the contract on the ſole ground of confiding in the ſlave's declaration, " purchaſe me, for I am a ſlave;" and hence it follows, that where a ſlave has been guilty of a deceit, he is liable for the price, in caſe the recovery from the ſeller be impracticable, in order that the injury occaſioned by his deceit may be removed from the purchaſer. The recovery from the ſeller, however, is impracticable only in caſe of his being abſent at a place which is not known.—As, moreover, ſale is a contract of exchange, it is poſſible to render the *director* of it reſponſible for the conſideration, (namely, the price,) when the ſubject is loſt or deſtroyed to the purchaſer, this being what a contract of ſale requires. It is otherwiſe with reſpect to *pawn*, as that is not a contract of exchange, but merely a contract of ſecurity for the receipt of the ſubſtance of the pawnee's right; for which reaſon it is lawful to give a pawn as ſecurity for the price, in a *Sirf* ſale, or for the goods, in a *Sillim* ſale, although an *exchange* with reſpect to either of theſe be unlawful:—in other words, if a pledge ſhould be deſtroyed whilſt in the poſſeſſion of the pawnee, the pawnee is in that caſe held to have received the ſubſtance of his right;—whereas, if a contract of pawn were in the nature of a contract of exchange, it would follow that in theſe caſes an exchange for the price in a *Sirf* ſale, or for the goods in a *Sillim* ſale, had been made previous to the ſeizin, and this is unlawful. The perſon, therefore, who directs others to enter into a contract of pawn cannot be rendered reſponſible for the debt to which the pawn is oppoſed. Analogous to this is a caſe where the maſter of a ſlave ſays to merchants, "trade with this ſlave "of mine, for I have privileged him to trade;" and the merchants having traded with him accordingly, it becomes afterwards known that the ſaid ſlave is the property of another; for in this caſe the creditors have a right to receive payment of their debts from the maſter.—It is to be obſerved that the difficulty, in this caſe, ariſes from the tenets of *Haneefa*; for, according to him, a claim is a neceſſary condition for the eſtabliſhment of freedom; and here a claim is out of the queſtion, ſince, if the ſlave, after the acknowledgment of his ſlavery, ſhould aſſert a claim to his freedom, he would be guilty of prevarication; and prevarication is deſtructive of the validity of a claim. It is therefore impoſſible that, after his own declaration, his freedom ſhould be made apparent; and hence the ſtatement of this caſe, according to the tenets of *Haneefa*, is erroneous.—But, in reply to this objection, ſome have obſerved that the proper ſtatement of this caſe is,—that a perſon purchaſes a ſlave at a time when the ſlave himſelf ſaid "purchaſe me, for I am a ſlave," and it afterwards appears that the perſon ſo purchaſed was *originally* free; for this ſtatement is ſtrictly agreeable to the tenets of *Haneefa*, ſince (according to him) the claim of freedom is required as a condition only in the caſe of a *freedman*, and not in that of a perſon *originally* free.—Others again maintain that the claim of freedom, in *this* ſtatement of the caſe alſo, is a neceſſary condition; and that the prevarication ſo occaſioned is not deſtructive of the validity of the claim; for generation is a concealed circumſtance; and the perſon not knowing that his mother was free at the time of his generation, he on that account declared himſelf a ſlave; but afterwards, attaining a knowledge of his mother's freedom at that period, he therefore claims his freedom.—If it be thus ſtated, that, a perſon having purchaſed a ſlave, it afterwards appears that the perſon ſo purchaſed was free, *as having been emancipated by his maſter*, ſuch ſtatement is correct, as it does not involve prevarication, ſince the maſter is empowered to emancipate his ſlave.—This caſe is therefore, in fact, the ſame as if a woman ſhould purchaſe her divorce from her huſband, and ſhould afterwards eſtabliſh, by witneſſes, that previous to ſuch bargain he had divorced her three times; or, as if a *Mokâtib* ſhould eſtabliſh, by witneſſes, that, previous to the contract of *Kitâbat*, his maſter had emancipated him;—for in both theſe caſes the claim and the evidences are admitted, notwithſtanding the prevarication; and ſo alſo in the preceding caſe. The ground of this is that the maſter being competent to emancipate his ſlave, he may have done it during his abſence, and the ſlave may afterwards have preferred his claim immediately on its coming to his knowledge; and on this ſuppoſition the prevarication is not held to be deſtructive of the claim.

If a perſon claim a right in a houſe, in an indefinite manner, and then compound his claim with the poſſeſſor of the houſe for an hundred
and a third perſon afterwards prove a right to the whole of the houſe excepting the quantity of a *cubit*, for inſtance, in that caſe the poſſeſſor of the houſe has no right to any reſtitution from the perſon with whom he entered into the compoſition; becauſe that perſon, having before made an indefinite claim without explaining the extent

Caſe of claim to an immoveable pro-

with

to it.

of it, may now lawfully declare it to have been the quantity excepted by the third perſon.—If, on the other hand, a perſon, having claimed the *whole* of a houſe, ſhould then compound with the poſſeſſor for an hundred *dirms*, and another perſon ſhould afterwards lay claim to part of the houſe, in that caſe the poſſeſſor of the houſe is entitled to a reſtitution of a part of the ſum he had paid in compoſition, proportionate to the amount of the ſecond claim.—It is to be obſerved that a compoſition of an undefined right for defined property is lawful, becauſe the annulment of an undefined right cannot occaſion contention.

SECTION.

Of Fazoolee Beea, *or the Sale of the Property of another without his Conſent.*

A ſale con- [illegible] proprietor of the ſubject.

If a perſon ſell the property of another without his order, the contract is complete, but it remains with the proprietor either to confirm or diſſolve the ſale as he pleaſes. *Shafeï* is of opinion that the contract, in this caſe, is not complete; becauſe it has not iſſued from a lawful authority; for that is conſtituted only by *property* or *permiſſion*, neither of which exiſt in this caſe. The arguments of our doctors are, that ſuch a ſale is a tranſaction of transfer, performed by a competent perſon with reſpect to a fit ſubject: it is therefore indiſpenſable that the contract be regarded as complete; for, beſides that there is no injury in this to the proprietor, (as he has the power of diſſolving it,) it is attended with a great advantage to him, inaſmuch as it frees him from the trouble of ſeeking for a purchaſer, ſettling the price with him, and other matters.—Moreover, it is attended with an advantage to the ſeller, whoſe word it preſerves ſacred, and to the purchaſer, to whom it confirms a bargain, with which, as having voluntarily concluded it, he may be ſuppoſed to be pleaſed.—In order, therefore, to obtain theſe advantages, a legal power is eſtabliſhed in the ſeller of another's property, more eſpecially as the conſent of that other has been given by implication, ſince a wiſe man naturally aſſents to a deed attended with advantage to himſelf.—It is to be obſerved that it is requiſite that the proprietor give his conſent on the condition of the ſubject of the ſale, and the buyer and ſeller being extant; becauſe, as his aſſent is a deed relative to the contract, it is neceſſary, of conſequence, when he gives it, that the contract be in exiſtence; and the exiſtence of the contract depends on the exiſtence of the parties, and of the ſubject of the ſale.

If aſſented to, the price is the property of the proprietor, and a depoſit with

WHEN the proprietor of an article, in a *Fazoolee* ſale, gives his aſſent to it, the price becomes his property, and remains in the hands of the *Fazoolee* ſeller as a depoſit, in the ſame manner as if he had been an agent for ſale; becauſe the aſſent is equivalent to a previous appointment of agency.

who is at liberty to diſſolve the contract without his

IT is in the power of the *Fazoolee*, or perſon who ſells the property of another without authority, to diſſolve the contract without having obtained the conſent of the proprietor. It is otherwiſe in the caſe of a *marriage* contracted by a *Fazoolee*, as that cannot be diſſolved without the conſent of the perſon on whoſe account he concluded it.

IT is to be obſerved that the exiſtence of the parties, and of the ſubject of the ſale, is ſufficient towards the conſent of the proprietor only in caſe of the price being in *money*; for, if it be ſtipulated in *goods*, then the exiſtence of the *price* alſo is a neceſſary condition.—In this caſe, however, the conſent of the proprietor is not an aſſent to the contract of ſale, (becauſe the ſale is, in this inſtance, a ſort of *chaſe*, and a *Fazoolee* purchaſe does not reſt upon the aſſent of the perſon on whoſe account the *Fazoolee* made the purchaſe, inaſmuch as the purchaſe is conſidered in law to have been made for himſelf,) but merely an aſſent to the *Fazoolee* purchaſer making over the property he has agreed to give in return for the property which has been conſtituted the price of it. This price, therefore, conſiſting of *goods*, becomes the property of the *Fazoolee*, who remains reſponſible for the ſubject of the ſale, payable in a ſimilar, if it be of a nature that admits of ſimilars,—or, if otherwiſe, for the value of it.

If the proprietor ſhould die, then the conſent of the heirs is of no efficacy in the confirmation of the *Fazoolee* ſale, in either caſe; that is, whether the price have been ſtipulated in *money* or in *goods*; becauſe the contract reſted entirely on the perſonal aſſent of the deceaſed.

If the proprietor die, and the ſubject be not ſpecified, the ſale is invalid.

If a perſon, having given his aſſent to a *Fazoolee* ſale, ſhould afterwards die, and it be not known whether the ſubject of the ſale was extant or not when he gave his aſſent, in that caſe, (according to one opinion of *Aboo Yooſaf*, which has been adopted by *Mohammed*,) the ſale is valid, becauſe of the probability of the exiſtence of the ſubject of the ſale at the period of aſſent. *Aboo Yooſaf*, however, afterwards receded from this opinion, and declared this ſale to be unlawful, becauſe of the doubt with regard to the exiſtence of the ſubject of the ſale, which in his opinion is deſtructive of its legality.

The emancipation, by the original proprietor, of a ſlave uſurped and ſold by the uſurper, is

If a perſon uſurp a ſlave, and ſell him to another, and, that other having emancipated him, the original proprietor afterwards confirm the ſale, in this caſe the emancipation, according to *Haneefa* and *Yooſaf*, is valid, upon a favourable conſtruction. *Mohammed* maintains that it is not valid, ſince an emancipation cannot be made except with relation to *property*, in conformity with a tradition of the prophet to that effect; and the purchaſer was not proprietor of the ſlave at the time of the emancipation, becauſe the validity of the ſale then reſted on the aſſent of the proprietor; and a ſuſpended ſale does not endow with a right of property. Where, moreover, the right of property is confirmed by the maſter's aſſent to the ſale, it becomes confirmed, firſt in the uſurper and then in the emancipator, by a retroſpect and devolution; and a right of property thus confirmed is eſtabliſhed in *one* ſhape but not in *another* ſhape; and manumiſſion is not valid except where the right of property exiſts in *every* ſhape, in conformity with the tradition above cited. Upon this principle it is that emancipation is not lawful where a perſon, having uſurped a ſlave, gives him his liberty and afterwards makes a retribution to the proprietor;—or, where a perſon, having purchaſed a ſlave, allowing an option to the ſeller, emancipates him, and afterwards receives from the ſeller a confirmation of the ſale. On the ſame principle alſo the *ſale* is unlawful, where a perſon, having purchaſed a ſlave from an uſurper, ſells him again to another, and the proprietor afterwards confirms the ſale of the *uſurper*;—and emancipation is likewiſe invalid, where a perſon, having purchaſed a ſlave from an uſurper, gives him his liberty, and the uſurper afterwards makes a retribution to the proprietor. The argument of the two *Elders* is that, in the caſe in queſtion, a ſuſpended right of property is eſtabliſhed in the purchaſer in virtue of an *abſolute deed* inſtituted for the purpoſe of enjoyment of property, namely, an *abſolute ſale* without any ſtipulation of option; and as, in the eſtabliſhment of this right of property, no injury reſults to any one, it follows that the emancipation of the purchaſer, (which reſts upon his right of property,) is alſo eſtabliſhed in ſuſpenſe, in the ſame manner as the right of property. When, therefore, in virtue of the aſſent of the proprietor, the right of property operates, it follows that the ſuſpended emancipation alſo operates:—in the ſame manner as where a perſon purchaſes a ſlave in pawn from the pawner, and afterwards emancipates him,—in which caſe the emancipation remains ſuſpended in its operation, as well as the right of property of the purchaſer, until the conſent of the pawnee be obtained, or the pawn be redeemed by the pawner:—or, as where an heir emancipates a ſlave belonging to the deceaſed, at a time when the eſtate was encumbered with debt,—in which caſe the emancipation remains ſuſpended in its operation until the debts be liquidated, when it immediately takes place. It is otherwiſe where an uſurper, having emancipated the ſlave he had uſurped, afterwards makes a compoſition with the proprietor; becauſe uſurpation does not entitle to the enjoyment of property:—or, where a purchaſer of a ſlave, under a ſale ſtipulating a condition of option to the ſeller, emancipates the ſaid ſlave; becauſe in that caſe the ſale is not *abſolute*, and the exiſtence of the option is preventive of the operation of the right of property in the purchaſer:—or, laſtly, where a perſon, having purchaſed a ſlave from an uſurper, ſells him to another, and afterwards the original proprietor gives his aſſent to the ſale of the uſurper; becauſe in virtue of the aſſent of the proprietor the right of property veſts in the purchaſer, upon ſuch aſſent being ſignified, *but not before:* the right of property, moreover, of the ſecond purchaſer was *ſuſpended*; and conſequently, as the right of property veſts in the firſt purchaſer *now* (and not *before*,) it neceſſarily follows that ſuch *ſuſpended* right of property becomes null.

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aſſent to ſuch
ſale.

If a perſon purchaſe a ſlave from one who had uſurped him, and the ſlave be maimed * by any perſon whilſt in the poſſeſſion of the purchaſer, and he [the purchaſer] exact the fine of treſpaſs from the maimer, and the original proprietor then give his aſſent to the ſale,—in this caſe the fine is the property of the *purchaſer*; becauſe the ſlave is in ſuch caſe conſidered as the property of the purchaſer, from the period of the purchaſe, whence it is evident that he was ſo at the time of the maiming: and this is an argument againſt the doctrine of *Mohammed*, exhibited in the preceding caſe, ſince as the fine is, in this inſtance, the right of the purchaſer ſolely in virtue of the eſtabliſhment of right of property in him from the period of the purchaſe, it follows that the *emancipation* of the purchaſer would be valid for the ſame reaſon. The reply of *Mohammed* to this is, that a right of property eſtabliſhed in *one* ſhape only (that is, in an *incomplete* manner) is ſufficient to entitle to a fine, but not to the performance of emancipation, which requires that the right of property be *perfect* and *complete.* It is to be obſerved that although the fine, in this caſe, be the right of the purchaſer, ſtill if it exceed the *half* of the price, it is requiſite that he beſtow the exceſs in charity; becauſe the fine for the deſtruction of the limb cannot exceed half the price, as the *fine of treſpaſs* for maiming a *freeman* is one half of the *fine of blood*, and conſequently, the fine for maiming a ſlave is one half of his *value.* Now nothing can be included in the reſponſibility beyond what may be oppoſed to the price, and implicated in it. Any exceſs, therefore, over *half* the price, is an acquiſition to which the proprietor is not entitled, or to which his claim is doubtful, and is therefore not perfectly lawful to him.

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* By diſmemberment of a *limb*, ſuch as the *hand*.

The *reſale* of a ſlave purchaſed from a uſurper is rendered invalid by the

IF a perſon purchaſe an uſurped ſlave, and ſell him to another, and the proprietor afterwards give his aſſent to the firſt ſale, in that caſe the ſecond ſale is invalid; becauſe the right of property then eſtabliſhed in the firſt purchaſer deſtroys the *ſuſpended* right of property of the ſecond purchaſer, as has been already explained; and alſo, becauſe there is an unfairneſs in it, ſince it is poſſible that the proprietor may not give his aſſent to the ſale. But if, after the ſale of the ſlave by the purchaſer, he ſhould then either die or be killed, and the proprietor afterwards give his aſſent to the ſale, ſuch aſſent is not valid; becauſe the exiſtence of the ſubject of the ſale is requiſite to the aſſent, and that no longer exiſts in either inſtance.

in the interim the aſſent is of no account.

OBJECTION.—The reaſon here alleged is a *valid* one where the ſlave dies a natural death; but it is not ſo where he is *ſlain*, becauſe in that caſe the ſlave, in virtue of the exiſtence of the *amercement*, is conſidered, as it were, to be *himſelf* in exiſtence,—for if a ſlave, having been ſold by a valid contract, ſhould afterwards be murdered whilſt in the poſſeſſion of the ſeller, ſtill the ſale is not null, ſince the conſideration for the ſubject of the ſale (namely the *amercement*) is extant,—whereas, if he die a natural death in the hands of the ſeller, the ſale is null. It would therefore appear that the aſſent, in caſe of the *murder* of the ſlave, is of no effect.

Reply.—In the caſe in queſtion it is not poſſible to conſider the fine as the right of the purchaſer, ſince not having been the proprietor of the ſlave at the period of the murder, he can have no right to the amercement, nor can the ſlave, in virtue of the exiſtence of the amercement, be conſidered as extant with reſpect to him. The ſlave, therefore, is not extant with relation to him, either *actually* or *virtually*. It is otherwiſe in the caſe of a *valid ſale*, becauſe there the purchaſer had acquired a right of property to the ſlave which may be transferred to the *conſideration* for him; and conſequently the ſlave may be conſidered as extant with reſpect to him.

An article purchaſed through the medium of an unauthorized perſon cannot be returned to the [illegible] purchaſer [illegible] the [illegible] of authority, or the proprietor's aſſent to the [illegible]

[illegible] ſeller avow his not being authorized, the ſale is null.

If a perſon ſell a ſlave, the property of another, and the purchaſer eſtabliſh by witneſſes that the ſeller had acknowledged that he had ſold him without the aſſent of the proprietor,—or, that the proprietor had declared that he had not given his aſſent to the ſale, and the purchaſer wiſh to return the ſlave, the evidence adduced by him is not to be admitted; becauſe there is a prevarication in his plea, ſince his act of purchaſing the ſlave amounts to a declaration of the validity of the ſale, and the plea he afterwards prefers is contradictory of this: his plea, therefore, is not valid; and teſtimony is to be taken only where the plea it tends to eſtabliſh is of a valid nature. If, however, ſeller ſhould declare before a magiſtrate that he had made the ſale without the authority of the proprietor, the ſale in that caſe becomes null, provided the purchaſer deſire the diſſolution of it, becauſe the inconſiſtency of the purchaſer is no bar to the validity of the declaration of the ſeller, and when the parties both concur in the ſame wiſh the ſale is rendered null of courſe:—but the concurrence of the purchaſer is a neceſſary condition. What is here advanced, that "the

“ evidence adduced by the purchaſer is not to be admitted,” is the doctrine of the *Jama Sagheer.* The compiler of the *Hedâya* obſerves that it is mentioned in the *Zeeâdat*, that if a perſon purchaſe a female ſlave (for inſtance) for one thouſand *dirms*, and take poſſeſſion and pay the price, and afterwards, in conſequence of another perſon claiming her as his property, and aſſerting his right[*] to her, ſurrender her to him,—and he [the purchaſer] eſtabliſh, by witneſſes, that the ſeller had acknowledged that the ſlave was the property of the ſaid claimant, the teſtimony ſo given is inadmiſſible. Between theſe two caſes, therefore, there is an evident contradiction, which, however, our modern doctors thus account for. In the caſe alluded to in the *Jama Sagheer*, the ſlave was in the poſſeſſion of the purchaſer when he produced the witneſſes; but in that from the *Zeeadât* the ſlave was in the poſſeſſion of the *claimant* and not of the *purchaſer*; and the condition on which a reſtitution of the purchaſe-money from the ſeller is warranted (namely, non-exiſtence of the ſubject of the ſale with relation to the purchaſer) not exiſting in the *firſt* caſe, but exiſting in the *ſecond*, the evidence in the firſt caſe is therefore rejected, and in the ſecond it is admitted.

In the ſale of *immoveable* property by an unauthorized perſon, the ſeller is

IF a perſon ſell a houſe belonging to another, without his permiſſion, and make delivery of it to the purchaſer, and afterwards declare that he had ſold it without the permiſſion of the owner, then (according to *Haneefa* and the laſt opinion of *Aboo Yooſaf*) the ſeller is not reſponſible [*]. The firſt opinion of *Aboo Yooſaf* was that the ſeller is reſponſible, and this opinion has been adopted by *Mohammed.* This caſe is one of the examples of uſurpation over immoveable property, concerning which there is a difference of opinion, as will be fully explained under the head of *Uſurpations.*

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[*] Meaning, that the proprietor is not to look to the *ſeller* for the price of his houſe, but to the *purchaſer*;—or, that the ſeller is not ſecurity for the purchaſer.

CHAP. XI.

Of *Sillim Sales.*

Definition of *Sillim.*

KADOOREE explains *Sillim* literally to ſignify, a contract involving a *prompt* delivery in return for a *diſtant* delivery. In the language of the LAW it means a contract of ſale, cauſing an immediate payment of the price, and admitting a delay in the delivery of the wares. In this kind of ſale, the wares are denominated *Mooſlim-fee-hee* [*], the price *Râſal* [†] the ſeller *Mooſlim-ali-hé* [‡], and the purchaſer *Rubul Sillim* [§].

A *Sillim* ſale is lawful

A SILLIM ſale is authorized and rendered legal by a particular paſſage in the KORAN, and alſo by an expreſs declaration of the prophet prohibiting any one from the ſale of what is not in his poſſeſſion, but authoriſing a *Sillim* ſale. It is to be obſerved that *Sillim* ſale is contrary to analogy, becauſe of the non-exiſtence of the ſubject of it, ſince it is a ſale of a non-exiſtent article, as the ſubject, in a *Sillim* ſale, is merely the thing for which the advance is made, and that does not appear. Analogy, however, is abandoned in this inſtance, becauſe of the text and tradition above cited.

in all articles of weight (except *dirms* and *deenars*,) meaſurement of capacity,

A SILLIM ſale, with relation to articles of weight, or meaſurement of capacity, is lawful, becauſe the prophet has ſaid "*Whoſoever enters "into a* SILLIM *ſale with you, let him ſtipulate a determinate weight "and meaſurement, and a determinate period of delivery.*" *Dirms* and *deenars*, however, are not included in the deſcription of articles of weight, becauſe both of theſe are repreſentatives of price, and in a *Sillim* ſale it is requiſite that the ſubject of it be otherwiſe than a repreſentative of price. Hence if a perſon ſhould enter into a *Sillim* ſale, ſtipulating the immediate payment of ten yards of cloth to the ſeller in lieu of ten *dirms* to be delivered to him by the ſeller at a future period, the *Sillim* ſale ſo contracted is invalid. Some have ſaid that this ſale is abſolutely null. Others, again, have ſaid that although, conſidering it as a *Sillim* ſale, it is certainly invalid, ſtill it is not *null*, ſince it may be executed ſo as to anſwer the views of the parties as far as poſſible, by conſidering it ſimply as a ſale of cloth for a price payable hereafter; more eſpecially ſince, in all contracts, the *ſpirit* is what is to be attended to. The former, however, is the better opinion; becauſe, although ſales may lawfully be rendered valid in every poſſible degree, with relation to the things concerned with the parties have contracted, yet as, in the caſe in queſtion, the things ſo contracted for are *dirms* and *deenars*, which from an expreſs prohibition are incapable of being made the ſubject of a *Sillim* ſale, the contract with relation to them cannot in *any* degree be rendered valid.

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[*] Literally, *the advanced on account of.* [†] The *capital ſtock.*

[‡] Literally, *the advanced to.* [§] Literally, the *advancer.*

longitudinal

A SILLIM ſale with reſpect to articles of *longitudinal* meaſurement, ſuch as *cloth*, or the like, is lawful, becauſe it is poſſible to define them exactly by ſpecification of the number of yards in reſpect to the length and breadth, and the quality and workmanſhip of it. (By the *quality* is meant the *fineneſs* or *coarſeneſs*; and by the *workmanſhip* the looſeneſs or cloſeneſs of the texture.) The ſpecification by a recital of theſe particulars, moreover, is requiſite, in order that ignorance may be avoided: it is therefore eſſential to the validity of the contract. In the ſame manner alſo, a *Sillim* ſale is lawful with reſpect to all articles of tale, which do not eſſentially differ in their unities, ſuch as *eggs* and *walnuts*; becauſe, in all articles of tale between the unities of which the difference is *trifling*, the rate is aſcertainable, the quality definable, and the delivery to the purchaſer practicable: a contract of *Sillim*, therefore, with reſpect to ſuch articles is lawful. In articles of this nature, alſo, the great and the ſmall are conſidered as the ſame, becauſe mankind have agreed in making no account of the difference. It is otherwiſe with reſpect to *melons* and *pomegranates*, becauſe the difference in them is conſiderable. It is to be obſerved that where there is a difference in the individuals of any kind, it may be known whether ſuch difference be of any account or not by the effect it has on the price. Thus articles of which the individuals of the ſame kind bear a different price are conſidered as different; but where the price is the ſame with reſpect to the individuals they are conſidered as ſimilar. It is related, as an opinion of *Haneefa*, that oſtrich eggs are not ſimilars, as they bear different prices.

It is to be obſerved that in the ſame manner as a *Sillim* contract is lawful with reſpect to ſimilars of tale according to number, ſo is it lawful with reſpect to them according to a meaſurement of capacity. *Ziffer* has ſaid that it is not lawful according to a meaſurement of capacity, as that does not apply to articles of tale; and it is alſo a tenet of his, that a *Sillim* ſale with reſpect to articles of tale is unlawful becauſe of the difference between the individuals of the kind. The reaſoning of our doctors is, that quantity is ſometimes aſcertained by number and ſometimes by meaſurement of capacity; and that ſimilars of the ſame ſpecies being conſidered as articles of tale only becauſe of the conſent and practice of mankind, they may for the ſame reaſon be ſubjected to a meaſurement of capacity by the conſent of the parties. A *Sillim* ſale is likewiſe lawful with reſpect to *Faloos*. Some have ſaid that this is the opinion of the two diſciples; but that *Mohammed* is of a different opinion, ſince, according to his doctrine, *Faloos* are repreſentatives of price. The doctrine of the two diſciples on this head has been already explained in treating of *Uſury*.

It is not lawful with re-
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A sillim ſale with reſpect to animals is unlawful. *Shafeï* deems it lawful, as the article may be aſcertained by an explanation of the genus, the age, the ſpecies, and the quality; after which only a ſmall difference can take place, in the ſame manner as in the caſe of cloth. Our doctors, on the other hand, argue that after ſuch explanations the difference may ſtill be great with reſpect to various qualities and hidden circumſtances, which muſt occaſion a contention: in oppoſition to the caſe of *cloth*, becauſe, as being the workmanſhip of *man*, there is rarely any material difference in two pieces of the ſame kind. Beſides, it is recorded in the *Nakl Saheeh* that the prophet forbad the *Sillim* ſale of *animals*; and this prohibition extends to every ſpecies of animals, even to *ſparrows*.

or the *parts* of animals, or ſkins, firewood, or hay, unleſs the quality be aſcertained.

Sillim ſale is not lawful with reſpect to the *parts* of an animal, ſuch as the *head*, or the *feet*, becauſe thoſe are not ſimilars of tale, nor is there any meaſure by which the ſize of them might be aſcertained. In the ſame manner alſo, a *Sillim* ſale is unlawful with reſpect to ſkins, according to number, or *firewood* according to *bundles*, or *hay* according to *packages*, except the quantity be aſcertained by ſpecifying the length of the ſtring that ties them; for then the *Sillim* ſale with reſpect to them is lawful, provided the mode of binding be not ſuch as to create a difference.

nor unleſs the ſubject be in continued exiſtence until the time of delivery.

A sillim *ſale* is not lawful, unleſs the ſubject of it be in exiſtence, from the concluſion of the contract, until the ſtipulated period of its delivery. Hence the ſale is not lawful if the ſubject be not in exiſtence at the formation of the contract, but be extant at the period ſtipulated for its delivery; or *vice verſa*;—or if, being extant at the formation of the contract, and the time of delivery, it ſhould have been non-exiſtent at ſome period of the intervening time. *Shafeï* maintains that the exiſtence at the period of delivery is ſufficient, whether the article have been extant before or not; becauſe in this caſe the ſeller is capable of delivery at the period on which delivery is required. The arguments of our doctors upon this point are twofold.—First, a ſaying of the prophet "*Ye ſhall not ſell fruits by way*

"*of*

until their ripeneſs be apparent," which evidently implies that the capability of the delivery from the formation of the contract is neceſſary.* Secondly, The capability of delivery is founded on the article being fit to be taken poſſeſſion of by the purchaſer, and it is therefore indiſpenſable that it be in uninterrupted exiſtence from the formation of the contract to the inſtant of delivery.

If, at the promiſed period of delivery, the ſubject of the *Sillim* be loſt or diſappear, the purchaſer has in that caſe the option of diſſolving the contract, and receiving back the price from the ſeller,—or of waiting until the ſubject of the ſale may be recovered. This is analogous to the abſconding of a ſlave after the ſale of him but before the delivery, in which caſe the purchaſer has the power of either diſſolving the contract or waiting until the ſlave may be recovered.

It is lawful with reſpect to articles which, although periſhable in their nature, are kept in a ſtate of preſervation,

or in ſituations where the article may always be had.

A sillim ſale is lawful with reſpect to dried and ſalted fiſh, provided it be according to a ſtandard weight, and the ſpecies be known; becauſe in this caſe the ſubject of the ſale is of an aſcertained nature, the quality is defined, and the delivery is practicable, ſince ſuch fiſh is always fit to be taken poſſeſſion of. This ſpecies of ſale, however, is not allowed according to *tale*, ſince the individuals amongſt fiſh are not ſimilar:—nor is it allowed with reſpect to *freſh* fiſh,—unleſs at ſuch a particular period of the year as renders the procurement of them certain, in which a *Sillim* ſale with reſpect to them, according to a fixed weight, is lawful, provided the ſpecies be defined. The reaſon of this is that freſh fiſh is not always to be had, being ſometimes withheld, in the winter ſeaſon, in conſequence of the water being frozen. In any *city*, however, where freſh fiſh are always to be procured, a *Sillim* ſale with reſpect to them is perfectly lawful, provided it be according to *weight*, and not by *tale*.—It is related, as an opinion of *Haneefa*, that it is not lawful to make a *Sillim* ſale with regard to the fleſh of fiſh of ſo large a nature as to occaſion their fleſh to be cut in the ſame manner as that of *oxen* or *goats* for inſtance, becauſe,

cauſe, being illegal with reſpect to all other animals, it follows that it is likewiſe ſo with reſpect to *fiſh*, of which the fleſh is equivalent to that of any other creature.

It is not lawwith reſpect

A SILLIM ſale of *fleſh* is utterly unlawful, according to *Haneefa*. The two diſciples maintain that it is lawful with reſpect to the fleſh of quadrupeds, provided a notification be made of the fleſh of a known and determinate part, (ſuch as the *haunch*, for inſtance,) and that a deſcription be given of the *qualities*, (ſuch as *fatneſs* or *leanneſs* for inſtance;) becauſe in this caſe the weight of the fleſh is determined, and the qualities are aſcertained,—whence it is that, in caſe of its deſtruction, a compenſation of a ſimilar is given, and alſo that it is lawful to borrow it according to weight, and that uſury takes place with regard to it. It is otherwiſe with reſpect to the fleſh of *birds*, for a *Sillim* ſale of that is unlawful, ſince it is impoſſible to ſpecify the fleſh of a particular part, inaſmuch as it is not a cuſtom to ſeparate the parts of birds in ſale, becauſe of their ſmallneſs. The argument of *Haneefa* is that the quantity of fleſh is uncertain, becauſe of the difference occaſioned by the bones, in regard either to their *number* or *groſſneſs*; and alſo, becauſe of the difference which takes place with reſpect to the fatneſs or leanneſs, as animals are fat or lean according to the ſeaſons; and as this uncertainty is a cauſe of contention, ſuch ſale is therefore inadmiſſible;—and for the ſame reaſon, the *Sillim* ſale of fleſh *without* bones is not lawful. This is approved. With reſpect to the caſes quoted by the two diſciples of a compenſation of a ſimilar being made for fleſh in caſe of its deſtruction, and of its being lawful to borrow it, the legality of ſuch compenſation, &c. is not admitted: but admitting the legality, ſtill the principle on which the compenſation of a ſimilar proceeds is evidently becauſe the retribution of a ſimilar is more equitable than that of *money*, ſince money anſwers only to the *object*, whereas the *ſimilar* anſwers both object and appearance; and the legality of borrowing fleſh is becauſe a ſeizin a ſeizin made by borrowing is an obvious and perceptible one; in oppoſition to that of a *Sillim* ſale, which reſts upon *deſcription.*

The period of delivery muſt be ſpecified.

A SILLIM ſale is not lawful unleſs the period for the delivery of the wares be fixed.—*Shafeï* has ſaid that it is lawful in either caſe; (that is, whether the period of delivery be fixed or not;) ſince it is recorded in the traditions that the prophet authorized *Sillim* ſales in an abſolute manner, without any reſtrictions regarding the limitation of the period. The arguments of our doctors upon this point are twofold.—FIRST, The prophet has ordained that all *Sillim* ſales ſhall be made with a ſtipulation of a fixed period for delivery.—SECONDLY, The prophet has prohibited man from ſelling what is not in his poſſeſſion, but has nevertheleſs authorized and rendered legal *Sillim* ſales, on this principle, that poor people ſtand in need of ſuch engagements, in order that, by means of the money they receive in advance, they may acquire the ſubject of the ſale, and deliver it to the purchaſer.—It is therefore requiſite that a fixed period be ſtipulated, becauſe if the ſeller were liable to an inſtantaneous delivery on demand, the principle on which the legality of ſuch ſale is founded would not be anſwered. Moreover, an indefinite period is unlawful, becauſe of the uncertainty; in the ſame manner as in a ſale where the price ſettled is to be paid at a future period without defining it. It is to be obſerved that the ſmalleſt term that can be fixed for a delivery, in a *Sillim* ſale, is one *month.*—Some allege the ſmalleſt term to be *three days*; others again fixt it at any term exceeding half a day. The *firſt* opinion is authentic; and decrees are paſſed accordingly.

Private ſtandards of meaſurement
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THE ſtipulation of a *private* meaſure of capacity or longitude is not lawful in a *Sillim* ſale, becauſe of the uncertainty, founded on the poſſibility of the criterion being loſt in the interval between the concluſion of the contract and the delivery; as has been already explained. It is neceſſary alſo that the inſtrument of meaſurement be of a ſubſtance not liable either to contract or expand, but that it be of a *fixed* nature, ſuch as a *large cup*. Leathern bags, however, (ſuch as thoſe in which water is contained,) are allowable for this purpoſe, according to *Aboo Yooſaf*, becauſe of the practice of mankind.

A SILLIM ſale, with reſpect to the grain of a ſpecific village, or the fruit of a ſpecific orchard, is not lawful; for if any accident ſhould happen to theſe particular places, the delivery becomes impracticable: ſuch practice has moreover been prohibited by the prophet.—This ſpecification is, however, lawful according to ſome doctors, provided it be to define the *quality*, as where a ſpecification is made of the grain of *Kiſhmarân* in *Bokhâra*, or of *Boſhâkee* in *Fargâna*.

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A SILLIM ſale is not lawful, according to *Haneefa*, except on ſeven conditions. I. That the genus of the ſubject of the ſale be ſpecified, ſuch as *wheat* or *barley*. II. That the ſpecies of it be fixed, ſuch as wheat of a ſoil that is watered by means of a *canal*, or other artificial mode, or wheat of a ſoil watered by *rain*. III. That the quality of it be fixed, ſuch as of the beſt or worſt kind. IV. That the quantity of it be fixed according to a ſtandard of weight, or meaſurement of capacity. V. That the period of the delivery be fixed, according to the ordinances in the traditions. VI. That the rate of the capital advanced be fixed, provided it be of a nature definable by a *rate*, as where it is an article of weight, of meaſurement of capacity, or of tale.—And, VII. That the place of delivery be fixed, provided the ſubject of the ſale, on account of its weight, require *porterage*.—The two diſciples have ſaid, that if the capital to be advanced be preſent, and exhibited, there is then no need of any mention of the *rate*; and alſo, that there is no need of explaining the place of delivery, ſince the delivery muſt be made in the place where the contract is concluded. Thus there is a diſagreement of opinion with reſpect to theſe two conditions between *Haneefa* and the two diſciples.—The argument of the two diſciples in ſupport of their *former* poſition, is that as

and requires that the *genus* be ſpecified, and that the ſpecies, quality, quantity, *period* of delivery,

be all determined.

the price is preſent and exhibited, the object may be obtained by a reference to it, the caſe being, in fact, the ſame as that of *cloth* ſtipulated as the price, in a *Sillim* ſale, of which ſpecification is not a requiſite condition, provided it be produced to view and capable of a reference. The arguments of *Haneefa* are twofold. FIRST, as it often happens that many of the *dirms* and *deenars* are of a bad kind, and that the purchaſer during the meeting is incapable of exchanging them, the ſeller therefore returns them; and a proportionate deduction being made from the wares, the ſale remains extant in a degree proportionate to the ſum received by the ſeller. Now, in this caſe, and under ſuch circumſtances, if the amount of the *dirms* be not known; it follows that it cannot be known in what extent the *Sillim* ſale exiſts. SECONDLY, as it ſometimes happens that the ſeller, being incapable of acquiring the ſubject of the ſale, is under the neceſſity of reſtoring the price, it follows that if this ſhould not have been explained, it is impoſſible to judge what ſum he ought to return.

OBJECTION.—Theſe two ſuppoſitions are merely imaginary, and therefore of no weight.

REPLY.—Imaginations, with reſpect to *Sillim* ſales, are equivalent to realities; becauſe ſuch ſales are of but a weak nature, being authorized (as has been already explained) in oppoſition to analogy.—Hence imaginations with reſpect to them are of weight; and it is neceſſary that the price be definite with reſpect to the rate, provided it be of ſuch a kind as that the contract may relate to a rate; but if it be *cloth*, the ſpecification of a number of yards is not required as a condition, ſince theſe are not conſidered as the *rate*, but the *deſcription*.

—As, alſo, (according to *Haneefa*,) an explanation of the rate of the price is an eſſential condition to a *Sillim* ſale, it follows that (agreeably to his tenets) a ſale of this nature is not lawful where the wares, being of different kinds, (ſuch as *wheat* and *barley*,) are oppoſed to any ſpecific ſum, (one hundred *dirms*, for inſtance,) without a ſeparate price being ſpecified in oppoſition to each of the kinds, becauſe the amount being here oppoſed generally to both, the particular price of each remains unknown.—In the ſame manner alſo, it is not lawful where, the price being of different kinds, (ſuch as *dirms* and *deenars*,) an explanation is given of the quantity of *one* of theſe kinds and not of the *other*; for in this caſe the contract of *Sillim* is not lawful in the degree to which an unknown quantity is oppoſed to it; and conſequently, it is alſo invalid with reſpect to the degree in which it is oppoſed to a *known* quantity, ſince one contract relates to both. According to the two diſciples both theſe modes of *Sillim* are lawful, ſince in their opinion an exhibition of the price without any explanation of the rate is valid.—The argument of the two diſciples in ſupport of their *ſecond* poſition is, that the place of the contract is fixed for the delivery, becauſe the contract, which is the cauſe of the delivery, did there take place: the caſe is therefore the ſame as that of a *borrower* or *uſurper*, on each of whom it is incumbent to deliver what he may have borrowed or uſurped at the place in which theſe deeds took place.—The reaſoning of *Haneefa* is, that as the delivery of the ſubject of a *Sillim* ſale is not *immediately* incumbent, the place in which the contract is concluded is not abſolutely fixed as the place of delivery.—(It is otherwiſe in caſes of *loan* or *uſurpation*, ſince the repayment of the loan and the reſtitution of the uſurped article are incumbent *upon the inſtant*.)—Now as the *place of concluding the contract* is not neceſſarily fixed as the place of delivery, it is requiſite that ſome place be ſpecified, as the uncertainty in this particular may otherwiſe produce a contention, ſince the price of goods varies in different places: it is therefore indiſpenſable that a place of delivery be ſpecified by the parties.—Ignorance, moreover, with reſpect to the place of delivery, is equivalent to uncertainty with reſpect to the quality of the goods or the quality of the price:—and accordingly, ſome of our modern doctors have ſaid that if a contention ariſe between the parties with reſpect to the place of delivery, then, agreeably to the tenets of *Haneefa*, their oaths muſt be ſeverally taken, as in the caſe of a contention regarding the quality of the price;—whereas, agreeably to the tenets of the two diſciples, their oaths are not to be taken.—Others, again, have ſaid that, agreeably to the tenets of *Haneefa*, their oaths are not to be taken; whereas, agreeably to the tenets of the two diſciples, their oaths are to be taken, becauſe, according to them, the place of delivery is virtually involved in the contract itſelf, and conſequently a contention with reſpect to it induces the neceſſity of the oaths of both parties, in the ſame manner as if it related to the goods or price:—and that the delivery, in the opinion of *Haneefa*, not being involved in the contract, but exiſting only as a condition, is therefore equivalent to a condition of option, or a determination of the period of the payment of the price;—and a contention regarding theſe does not induce the neceſſity of the oaths of the parties, but is determined by the affirmation of the ſeller.

It is to be obſerved that, in the ſame manner as *Haneefa* and the two diſciples diſagree regarding the ſpecification of the place of delivery in a *Sillim* ſale, ſo alſo they diſagree regarding the ſpecification of a place for the payment of the price, (where it is ſtipulated at a future period,)—the ſpecification of a place for the payment of rent,—and alſo, the ſpecification of a place for the payment of a ſum due from a partner in a diviſion of ſtock.—An example, with reſpect to *payment of the price*, appears where a perſon purchaſes any thing in exchange for articles of weight or meaſurement of capacity,—or for ſome definite price,—in which caſe, according to *Haneefa*, it is requiſite that the place of payment be ſpecified, provided the price be payable at a future period;—whereas, according to the two diſciples, ſuch condition is unneceſſary, as the place of concluding the contract is abſolutely fixed for the payment.—(Some have ſaid that *Haneefa*, in this particular, coincides with the two diſciples. This, however, is erroneous, ſince it is certain that a difference of opinion obtains, as has been already ſtated; and ſuch, alſo, is the opinion of *Shimſal-Ayma*.)—An example, with reſpect to *rent*, appears where a perſon rents a houſe, a quadruped, or the like, ſtipulating the price to conſiſt of ſome article of weight or meaſurement of capacity, or of ſome ſpecific article ſuch as is capable of being a debt upon the perſon,—in which caſe, according to *Haneefa*, it is requiſite that the place of payment of ſuch rent be particularly mentioned,—whereas, according to the two diſciples, the mention of it is not requiſite, but the houſe itſelf is fixed as the place of payment,—or (in the caſe of hire of an animal,) the place where the hirer returns the animal to its owner.—An example with reſpect to a diviſion of property, appears where two perſons, jointly poſſeſſing a houſe, agree to divide off their ſhares, and one of them, having obtained a larger portion than he is entitled to, agrees to compound with the other by the payment of a particular ſum,—in which caſe, according to *Haneefa*, the ſpecification of the place of payment is a neceſſary condition,—whereas, according to the two diſciples, this is unneceſſary, as the place of concluding the agreement determines the place of payment.

IF the article for which the advance is made be of ſuch a nature as does not require any expence of *porterage*, ſuch as *muſk*, *camphire*, *ſaffron*, or *ſmall pearls*, there is no neceſſity, according to all our doctors, for fixing the place of delivery; becauſe the difference of place occaſions no difference of price; and in this caſe the delivery muſt be made where the contract is concluded.—The compiler of the *Hedáya* remarks that this is the doctrine laid down in the *Jama Sagheer*, and alſo in the *Mabſoot* treating of *ſales*:—but that in the *Mabſoot* treating of *hire* it is ſaid that the ſeller may deliver the goods wherever he pleaſes;—and this is approved; becauſe the delivery is not immediately due; and alſo, becauſe, all places in this caſe being ſimilar, there is no neceſſity for the particular determination of any. Now, the queſtion is, if the parties agree upon a place of delivery, whether it be abſolutely fixed thereby or not.—Some are of opinion that it is *not* fixed, becauſe in ſo determining it there is no advantage.—Others, again, maintain that it *is* fixed thereby, as its being ſo is advantageous, ſince the danger of the roads is thereby avoided.—If, in

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caſe of the goods requiring porterage, a *city* be fixed on for the delivery, there is then no neceſſity for ſpecifying the particular ſtreet or lane, becauſe a city, notwithſtanding the variety of its parts, is conſidered as *one place.*—Some have ſaid that this proceeds on a ſuppoſition of the city not being large;—but that, if its extent be a *Faraſang**, the ſpecification of a particular part is, in that caſe, a neceſſary condition.

The price muſt be received at the meeting;

A SILLIM ſale is not valid unleſs the ſeller receive the price in the meeting, prior to a ſeparation from the purchaſer; becauſe if the price be ſtipulated in *money*, it would otherwiſe follow that one debt is oppoſed to another debt; a practice which has been prohibited by the prophet;—or, if the price be ſtipulated in *wares*, it is invalid, becauſe the characteriſtic of *Sillim* is "a prompt receipt of ſomething in lieu of "ſomething to be given," which would not be eſtabliſhed if a prompt delivery of the price did not take place. Beſides, the payment of the price is neceſſary, to enable the ſeller to acquire the goods, that he may become capable of delivery;—and hence lawyers have ſaid that a *Sillim* ſale, containing a condition of option in favour of both or one of the parties, is invalid, becauſe a condition of option is a bar to the completion of the ſeizin, inaſmuch as it prevents the concluſion of the contract in regard to its effect, namely, the eſtabliſhment of right of property;—and alſo, that the purchaſer has no option of inſpection, becauſe it is vain and uſeleſs; ſince the goods are a debt due from the ſeller, and conſequently undetermined; whereas a thing ſeen becomes determined.—It is otherwiſe with reſpect to an option of defect; becauſe that is no bar to ſeizin;—and hence, if ſuch a ſtipulation be made, and the parties annul it before the cloſe of the meeting, and the ſeller be in poſſeſſion of the price, ſuch *Sillim* ſale is valid: in oppoſition to the opinion of *Ziffer*.

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* A *league*, about 18,000 feet, or 3½ miles in length.

IF a perſon purchaſe a *Koor*[*] of wheat, by a *Sillim* contract, for two hundred *dirms*, and, the ſeller being indebted to him one hundred *dirms*, he [the purchaſer] make the advance by immediately paying to him [the ſeller] one hundred *dirms*, and oppoſing the debt of one hundred *dirms* to the remainder,—in that caſe the contract is invalid in the amount of the debt of one hundred *dirms*,—becauſe a preſent ſeizin is not made of them; but it is valid in the amount of the one hundred *dirms* paid down, becauſe of the obſervance of the conditions of legality with reſpect to that proportion, and becauſe it is not affected by the invalidity of the other proportion, as ſuch invalidity is ſupervenient, the ſale being valid originally; and hence, if the purchaſer, in this caſe, ſhould pay down one hundred *dirms* on account of the debt before the end of the meeting, the ſale becomes valid: but as, in the preſent inſtance, the purchaſer does not pay off his debt, but merely oppoſes a *clearance* of his debt in lieu of ready payment of one hundred *dirms*, and the contracting parties ſeparate from the meeting, the ſale is therefore invalid in that degree.—The reaſon of this is, that if a *debt* be eſtabliſhed as the price, in a contract of ſale, ſtill *that* is not *abſolutely fixed* as the price; (whence if a perſon purchaſe goods in exchange for a debt due to him by the ſeller of the goods, and both parties afterwards agree that the debt was *not* due, yet the ſale does not become null;)—and ſince the *debt* is not *abſolutely fixed* as the price, ſo as to be capable of conſtituting capital ſtock, it follows that the contract, in ſuch caſe, does originally take place, and afterwards becomes invalid from that circumſtance.

whence if a *debt* owing from the ſeller to the purchaſer be conſidered as part of it, the ſale is invalid in that proportion:

IT is not lawful for the ſeller to convert to uſe, or, by any deed, to diſpoſe of the price advanced, in a *Sillim* ſale, (as if he ſhould *ſell* it, for inſtance,) prior to his ſeizin of it, becauſe in this caſe the ſeizin of the price, which is an eſſential condition in a *Sillim* ſale, would be

but it cannot be diſpoſed of by the ſeller until he ſeize of it;

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[*] A dry *Babyloniſh* meaſure of 7,100. lib.—(See *Richardſon*'s Dictionary.)

nor can the purchaſer perform any act with reſpect to the goods, until he receive them.

defeated.—In the ſame manner, alſo, it is unlawful for a purchaſer, in a *Sillim* ſale, to perform any act with reſpect to the goods previous to the receipt of them; becauſe an act with relation to the ſubject of a ſale previous to the ſeizin is unlawful.—For the ſame reaſon, alſo, it is unlawful for the purchaſer, prior to ſeizin, to admit another to a ſhare in the goods, or to diſpoſe of them at prime coſt.

In a diſſolution of *Sillim* the ſtock cannot be applied to the purchaſe of any thing from the ſeller until it be firſt received back.

If both parties agree to diſſolve a contract of *Sillim*, the purchaſer is not, in that caſe, entitled to accept or purchaſe any thing from the ſeller in exchange for the ſtock he has advanced, until he has firſt received it back complete; becauſe the prophet has ſaid, "*Where ye diſſolve a contract of ſale upon which an advance has been made, take not from him to whom ye have paid the advance any thing except that which ye have advanced to him*;"—and alſo, becauſe, as the capital advanced, in this inſtance, is reſembling and like unto the ſubject of the ſale, it follows that any act with reſpect to it, previous to ſeizin, is invalid.—The reaſon why the capital advanced *reſembles* the ſubject of the ſale is, that a diſſolution is equivalent to a new ſale with relation to a third perſon, (that is, to any other than the parties themſelves,) and it is therefore neceſſary that the ſubject of the ſale be extant. Now it is impoſſible that the goods contracted to be provided can be conſidered as the ſubject of the ſale, ſince they are not extant; it is therefore neceſſary to conſider the price in that light; and this conſequently becomes a debt due by the ſeller, in the ſame manner as the goods were.

Objection.—Since a diſſolution is equivalent to a new contract, ſimilar to the firſt, it would follow that it is indiſpenſable that the advanced capital be received back by the purchaſer at the meeting in which the diſſolution is determined on, in the ſame manner as it is requiſite that it be advanced to the ſeller at the time of concluding the contract: whereas it is otherwiſe.

Reply.—It is not indiſpenſable that this be received back at the interview of diſſolution, becauſe the diſſolution is not in all reſpects ſimilar to the firſt contract.

—Concerning the caſe in queſtion *Ziffer* has given a different opinion, for, according to him, any deed relating to the price, previous to the ſeizin, is lawful:—but the reaſoning above ſtated is a ſufficient refutation of this opinion.

IF a perſon ſell a *Koor* of wheat by a *Sillim* ſale, and afterwards, when the period of delivery arrives, purchaſe the ſame from another, and then deſire the purchaſer to receive it from that other in diſcharge of his claim upon him; and the purchaſer accordingly take poſſeſſion of the ſame, ſtill he is not conſidered to have made ſeizin of the ſubject of the *Sillim* ſale, and conſequently, if the wheat be loſt or deſtroyed whilſt in his poſſeſſion, the ſeller is reſponſible for the ſame. But if the ſeller ſhould have deſired him to receive it firſt on *his* [the *ſeller*'s] account, and afterwards on *his own* account, and the purchaſer, accordingly, firſt meaſure it out and receive it on account of the ſeller, and afterwards meaſure it out and receive it on his own account, the ſubject of the *Sillim* ſale is in that caſe delivered, and the purchaſer becomes completely ſeized of the ſame. The reaſon of this is, that there is here a conjunction of two contracts; *firſt*, the *Sillim* ſale; and, *ſecondly*, the ſale between the ſeller of the *Sillim* ſale and the third perſon; and it is a neceſſary condition that the meaſurement take place in both, becauſe the prophet has prohibited the ſale of wheat until the meaſure both of the purchaſer and the ſeller ſhall have been applied to it; and this prohibition (as has been already explained) evidently alludes to the conjunction of two contracts, ſuch as in the caſe in queſtion.

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OBJECTION.—As the *Sillim* ſale is previous to the purchaſe of wheat made by the *Sillim* ſeller, it follows that the two contracts are not conjoined.

REPLY.—The *Sillim* contract is antecedent, but the ſeizin of the ſubject of it is poſterior;—and the ſeizin here is equivalent to a ſale *de novo*; becauſe, although the ſubject of the *Sillim* ſale was a debt incumbent on the ſeller, and what the purchaſer had received was a determinate thing, and conſequently, in reality, *different* from a debt, yet they are in this caſe conſidered as one and the ſame thing, leſt it ſhould follow that the exchange of the ſubject of a *Sillim* ſale has been made previous to the ſeizin of it; for if they were to be conſidered as two things, it would follow that the ſubject of the *Sillim* ſale prior to the ſeizin of it was given in exchange for what the purchaſer made ſeizin of, namely, a *determinate thing* and not a *debt*.—Now ſince the ſeizin is proved to be in the nature of a ſale *de novo*, it follows that two contracts are conjoined, namely, the purchaſe of the wheat by the *Sillim* ſeller, and the ſeizin of it by the *Sillim* purchaſer, which is equivalent to a ſale *de novo*; that is, the caſe is the ſame as if the *Sillim* ſeller, having purchaſed it from the purchaſer, were to re-ſell it to the *Sillim* purchaſer.

ſurement is not required in a ſimilar receipt of article by a *lender*.

IF a perſon, indebted to another in a *Koor* of wheat, not on account of a *Sillim* ſale [*], but on account of a *loan*, ſhould purchaſe a *Koor* of wheat from another, and then deſire his creditor to receive the ſame from the other, in lieu of what he had borrowed, and the creditor, having meaſured out the ſame, ſhould accordingly take poſſeſſion of it, ſuch ſeizin is valid, and a re-payment of the loan is eſtabliſhed; becauſe a loan of *indefinite* property [*Karz*] is equivalent to a loan of *ſpecific* property [*Areaat*,]—and hence the *Koor* of wheat ſo meaſured and received by the lender may be ſaid to be his actual right, for which reaſon the tranſaction is not regarded as *a conjunction of two contracts*, [with reſpect to one ſubject] and it is conſequently not requiſite that the wheat be meaſured a *ſecond* time.

If the ſeller meaſure the article, on behalf of the purchaſer, in his abſence, it is not a deli-

IF a perſon, having purchaſed a *Koor* of wheat by a *Sillim* ſale, ſhould order the ſeller to meaſure it and put it into his (the purchaſer's) ſack, and the ſeller having accordingly meaſured it out, ſhould put it into the ſack at a time when the purchaſer is not himſelf preſent, very,—altho' it be meaſured into the purchaſer's ſack;

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[*] That is, *as an article for which he had received an advance.*

preſent, in this caſe a delivery of the goods is not held to have taken place, (inſomuch that if the wheat ſhould in that ſituation be deſtroyed, the loſs falls entirely on the *ſeller*;) becauſe the purchaſer, in a *Sillim* ſale, does not become proprietor of the article, for which he makes the advance, until actual ſeizin, as his right is of an *indefinite* nature and not *determinate*: now the *wheat*, in the caſe in queſtion, is a *determinate* article, and hence the order given to the ſeller by the purchaſer to meaſure it out was not valid,—ſince the order of a director is of no account except with reſpect to his own property.—Thus the ſeller, as it were, *borrowed* the ſack of the purchaſer, and put wheat which was his own property into it;—in the ſame manner as if a perſon, having a debt of ſome *dirms* due to him by another, ſhould give his purſe to the debtor and deſire him to weigh the *dirms* and put them into it; in which caſe if the debtor act accordingly, ſtill the creditor does not by the performance of this act become ſeized of thoſe *dirms*.—If, on the contrary, a perſon, having purchaſed wheat that is determinate and preſent, ſhould direct the ſeller to meaſure it, and put it into his [the purchaſer's] ſack, and the ſeller act accordingly, at a time when the purchaſer is abſent, the purchaſer is nevertheleſs ſeized of the ſame in virtue of that act, becauſe his directions to the ſeller were efficient, as the property of the wheat had veſted in him in conſequence of his purchaſe of it.—Hence it appears that in a *common* ſale the purchaſer becomes proprietor of the article previous to the ſeizin,—whereas, in a *Sillim* ſale, the right of property does not veſt until after the ſeizin.—Hence, alſo, in a *Sillim* ſale, if the purchaſer deſire the ſeller to *grind* the wheat, put in the manner above recited into his bag, the flour is the property of the ſeller;—whereas, if the ſame were to be done in caſe of a *common* ſale, it would be the property of the *purchaſer*. In the ſame manner, alſo, if the purchaſer ſhould deſire the ſeller to throw the wheat into the river, and he act accordingly, then, in a *Sillim* ſale, the loſs would reſult to the *ſeller*,—whereas, in a *common* ſale it would fall upon the *purchaſer*, and he would remain reſponſible for the price, ſince his order was efficient.

ficient. Hence, in the *Rawâyet-Saheeh*, it is declared to be ſufficient that the ſeller, by the direction of the purchaſer, meaſure out the article and put it into the purchaſer's ſack; and there is no neceſſity for another meaſurement, ſince in this caſe the ſeller acts as agent for meaſurement to the purchaſer; and the ſeizin is completely eſtabliſhed, becauſe of the falling of the wheat into the purchaſer's ſack.

—and ſo alſo, if it be meaſured by the ſeller into *his own* ſack, at the purchaſer's inſtance, although the purchaſer be preſent.

If a perſon purchaſe wheat, and direct the ſeller to meaſure it out and put it into his own ſack, and the ſeller act accordingly, the purchaſer is not ſeized of it, inaſmuch as he borrowed the ſack of the ſeller without taking poſſeſſion of it, and conſequently does not become ſeized of its contents.—The caſe is therefore the ſame as if the purchaſer had directed the ſeller to meaſure out the wheat and place it in a particular corner of his own houſe, which being completely in the poſſeſſion of the ſeller, the purchaſer cannot conſequently be ſeized of any thing in it.

Caſe of delivery of a *determinate* article.

If an undeterminate and a ſpecific thing be joined together, by a perſon (for inſtance) purchaſing a ſpecific *Koor* of wheat, and alſo entering into a *Sillim* contract for another *Koor* of the ſame (the former of which is *ſpecific* and the latter *undeterminate*,) and then directing the ſeller to meaſure out both into his own ſack, in that caſe, if the ſeller firſt meaſure the *ſpecific* wheat into the ſack, and afterwards the *undeterminate* wheat, the purchaſer is ſeized of *both* the meaſures of wheat;—of the *determinate* wheat, becauſe his directions to the ſeller with reſpect to it were efficient, as *it* was his undoubted property;—and of the *undeterminate* wheat, becauſe, upon the ſeller meaſuring it out, and placing it in the bag, it then becomes implicated with the property of the purchaſer, and on account of ſuch implication the purchaſer becomes ſeized of it.—The caſe therefore is analagous to where a perſon, having ſolicited the loan of ſome wheat, deſires the lender to ſcatter it on his (the borrower's) ground,—or, where a perſon conſigns his ring to a jeweller with directions to add to it more gold, to the weight of half a *deenar*;—for in both theſe caſes the ſeizin takes place immediately on the implication with the property.—If, on the contrary, in the caſe in queſtion, the ſeller firſt meaſure out the *undeterminate* wheat, and place it in the purchaſer's ſack, and afterwards the *ſpecific* wheat, the purchaſer does not become ſeized of either; becauſe his directions to meaſure out the undeterminate wheat were not efficient, and conſequently the property of it remained with the ſeller, as before:—and having afterwards mixed the *determinate* wheat with his own property, he thereby deſtroys and annuls the right of property of the other. — This is founded on the doctrine of *Haneefa*, according to whom the implication of the property of another with one's *own* is deſtructive of the right of property of that other; and on this principle he holds the ſale with reſpect to the determinate wheat to be diſſolved.

OBJECTION.—The above implication is with the conſent of the purchaſer, ſince it was by his order that the ſeller made the meaſurement, and hence the ſale ought not in this caſe to be diſſolved.

REPLY.—The implication is not made with the conſent of the purchaſer, ſince there is a probability that his object was that the ſpecific wheat ſhould firſt be meaſured out.

—What is here advanced is founded on the doctrine of *Haneefa*, as above ſtated. The two diſciples are of opinion that the purchaſer has the option of either diſſolving the ſale or ſharing with the ſeller in the mixed property; becauſe, according to them, the implication of the property of another with one's own is not in all caſes deſtructive of the right of property of that other.

If the contract be diſſolved, and the article advanced periſh before

IF a perſon purchaſe a *Koor* of wheat by a *Sillim* contract, making a female ſlave the price advanced, and after the ſeller taking poſſeſſion of the ſlave the parties diſſolve the contract, and the ſlave afterwards die whilſt yet in the poſſeſſion of the ſeller, in this caſe the ſeller is reſponſible for the value ſhe bore on the day of ſeizin.—If, alſo, the diſſolution be made *after* the death of the female ſlave, it is valid, and the ſeller in the ſame manner remains reſponſible for the value at the period of ſeizin.—The reaſon of this is that the validity of a diſſolution reſts upon the exiſtence of the contract, and that, again, reſts upon the exiſtence of the ſubject of it: now, in a contract of *Sillim*, the *article advanced for* is the *ſubject* of the contract; and as that, in the caſe in queſtion, ſtill continues in exiſtence, it follows that the diſſolution is valid:—and the diſſolution being valid, and the contract of *Sillim* conſequently cancelled with reſpect to the article advanced for, it follows that it is alſo cancelled with reſpect to the ſlave, (being the price paid in advance,) as a *dependant* of the article advanced for, although it be not valid with reſpect to the ſlave, *originally*, becauſe of her non-exiſtence, ſince there are many things which, although not valid *originally*, are yet ſo *dependantly*.—The contract, therefore, being cancelled with reſpect to the ſlave, it becomes incumbent upon the ſeller to return her; but as this is impracticable, he muſt pay her value.

The diſſolution of a ſale is rendered invalid by the article periſhing before reſtitution.

If a perſon, having purchaſed a ſlave, ſhould agree with the ſeller to diſſolve the bargain, and the ſlave afterwards die in his poſſeſſion, the diſſolution is invalid;—or, if the ſlave die *firſt*, and the parties *then* agree to diſſolve the contract, in this caſe alſo the diſſolution is invalid;—becauſe, the ſlave being the ſubject of the ſale, and his death of conſequence deſtroying the exiſtence of the contract, the diſſolution is therefore invalid from the beginning in the ſecond caſe, and becomes invalid in the end in the firſt caſe,—as the ſubject no longer remains. It is otherwiſe in a caſe of *Beca Mookâyeza*, or *barter*; becauſe a diſſolution in that caſe is valid after the decay or deſtruction of one of the articles; ſince either of them being capable of becoming the ſubject of the ſale, the *exiſting* one is therefore conſidered as ſuch.

In a diſpute with reſpect to the value of the ſubject,

If a perſon enter into a contract of *Sillim* for a *Koor* of wheat, at the rate of ten *dirms*, and the ſeller afterwards aſſert that "he had agreed for "wheat of an *inferior* ſort," and the purchaſer deny this, aſſerting that

“ the ſtipulation of wheat was made in an *abſolute* manner, and “ therefore the contract is invalid,” in ſuch caſe the aſſertion of the ſeller, corroborated by an oath, muſt be credited, ſince he pleads the validity of the contract, by virtue of the declaration of a condition of it; and the aſſertion of the purchaſer, notwithſtanding his denial of the validity of the contract, is not credited, becauſe it tends to a deſtruction of his own right, ſince it is a cuſtom, in *Sillim* ſales, that the goods advanced for be *ſuperior* to the ſum advanced.—If a *vice verſa* diſagreement take place between the parties, the learned ſay that, agreeably to the doctrine of *Haneefa*, the aſſertion of the *purchaſer* is credited, ſince he claims the validity of the contract.—According to the two diſciples, the aſſertion of the *ſeller* is credited in both caſes, as he is the defendant in both, notwithſtanding that, in the latter, he deny the validity of the contract. This will be more fully explained hereafter.

the aſſertion of the ſeller (upon oath) muſt be cre-

IF a diſagreement take place between the parties to a *Sillim* ſale, by the ſeller aſſerting that a period of delivery had *not* been determined in the contract, and the purchaſer aſſerting that it had, the aſſertion of the purchaſer muſt be credited, becauſe a determination of a period for delivery is a right of the ſeller, and his denial is therefore a wilful injury to himſelf.

If the ſeller deny the appointment of a period of delivery, the aſſertion of

riod, muſt credited.

OBJECTION.—The ſeller denies the determination of a period for delivery from a view to his own advantage; ſince ſuch denial is the cauſe of annulling the contract, by which means he obtains the property of the goods he had engaged to deliver. Hence his denial is *advantageous* and not *injurious* to himſelf.

REPLY.—The invalidity of a *Sillim* contract, becauſe of the period of delivery being undeterminate, is not certain, ſince our doctors have diſagreed on this point. The advantage, therefore, in this view, is of no account;—whereas the advantage to the *ſeller*, from the determination of ſuch period, being obvious, his denial of it thereupon is an injury to himſelf.—It is otherwiſe in the caſe of a diſagreement between the parties with regard to the exiſtence of a condition concerning the quality of the article; becauſe in that inſtance the invalidity of the contract, from a want of a definition of the quality, is certain.

—If, on the other hand, the ſeller aſſert that the period had been determined, and the purchaſer deny this, in that caſe, according to the two diſciples, the aſſertion of the purchaſer muſt be credited, becauſe he denies the right which the ſeller claims from him, although, at the ſame time, he deny the validity of the contract;—in the ſame manner as holds with reſpect to the proprietor of the ſtock in a contract of *Mozáribat*;—that is to ſay, if the proprietor of the ſtock were to ſay to his *Mozárib*, or manager, "I ſtipulated that a half of the "profit ſhall go to you excepting ten *dirms*;" and the manager deny this, and aſſert that he had ſtipulated a *half* of the profit in his favour, in this caſe the aſſertion of the proprietor of the ſtock is credited, ſince he denies the claim of right of the agent, notwithſtanding he thereby at the ſame time deny the validity of the contract between them.—*Haneefa* ſays that, in the caſe in queſtion, the aſſertion of the *ſeller* is to be credited, becauſe he claims the validity of the contract. Beſides, the purchaſer and ſeller both agree in their having made a *Sillim* contract, and conſequently they both apparently agree in the validity of it:—but, again, the purchaſer, in denying the aſſertion of the ſeller, denies the validity of the contract, which is the denial of a thing he at the ſame time admits, and is conſequently not worthy of credit.—It is otherwiſe in the caſe of *Mozáribat*, becauſe a contract of *Mozáribat* is not binding upon either the manager or the owner of the ſtock, ſince the manager may refuſe the execution of the *Mozáribat* at any time, and the conſtituent may diſmiſs him when he pleaſes: ſuch a diſagreement, therefore, in the caſe of *Mozáribat*, is of no conſequence, the plea of *invalidity*, in this inſtance, amounting, in fact, to nothing more than a refuſal to carry the contract into execution, which it is lawful for either party to do. There remains, therefore, only the claim to profit on the part of the manager; and as this is oppoſed by the proprietor of the ſtock, his declaration muſt conſequently be credited.—A *Sillim* contract, on the contrary, is *abſolute*, and therefore of a different nature. —From the above diſcuſſion it appears to be a general rule that the aſſertion of a perſon who denies his own right, and not the right of another upon him, is not credited in the opinion of all our doctors;—and that whoever pleads the validity of a contract muſt be credited in his aſſertion, according to *Haneefa*, provided both parties be agreed in the uniformity of the contract, ſuch as that of *Sillim*, which, whether valid or invalid, is of an *uniform* nature; in oppoſition to *Mozáribat*, which, in caſe of its validity, is a contract of participated profit, and in caſe of its invalidity is merely a contract of hire.—The two ſcholars are of opinion that, in the caſe in queſtion, the aſſertion of the *defendant* muſt be credited, notwithſtanding he thereby deny the validity of the contract.

IF a perſon enter into a *Sillim* contract with reſpect to *cloth*, deſcribing its length, breadth, and quality of fineneſs or coarſeneſs, ſuch ſale is valid, becauſe it is a contract of *Sillim* which relates to a known thing, and of which the delivery is practicable. If the ſubject of the ſale be a piece of *ſilk* ſtuff, it is neceſſary, in addition, to ſettle the , *that* alſo being an object in this inſtance.

In *Sillim* ſales of *piece* goods all the qualities muſt be particularly ſpecified.

A SILLIM ſale of jewels or marine ſhells is not lawful, becauſe the unities of theſe vary in their value.

A SILLIM ſale of ſmall pearls that are ſold according to weight is lawful, as the weight aſcertains the ſubject of the ſale.

Sillim ſale is not valid in , or jewels: but it is valid in ſmall pearls ſold by *weight*,

THERE is no impropriety in a ſale of *bricks*, whether they be in a wet or dry ſtate, provided a deſcription be given of the mould in which they are formed, becauſe bricks, in their unities, are of a ſimilar nature, more eſpecially where their mould is deſcribed.—In ſhort,

ir

and (in ſhort) in all articles which admit a general deſcription of quality, and aſcertainment of quantity;

every thing of which it is poſſible to comprize a deſcription of the qualities, and a knowledge of the quantity, is a fit ſubject of *Sillim* ſale, as it cannot occaſion contention; on the other hand, a *Sillim* ſale is not lawful with reſpect to things incapable of being defined by a deſcription of quality or quantity; becauſe the ſubject of a *Sillim* ſale is a debt due by the ſeller; and if its quality be not known there conſequently exiſts a degree of uncertainty from which a contention muſt ariſe.

or which are particularly defined.

There is no impropriety in a *Sillim* ſale of pots or veſſels for boiling water, or of *boots*, or the like, provided theſe articles be particularly defined, becauſe the conditions eſſential to the validity of a *Sillim* ſale are here obſerved:—but if the articles be not defined, the ſale is abſolutely invalid, the ſubject of the ſale being in ſuch caſe an undefined debt. It is alſo lawful to beſpeak any of theſe articles from the workman without fixing the period of delivery.—Thus if a perſon ſhould deſire a boot-maker to make boots on his account, of a particular ſize and quality, ſuch agreement is lawful, on a favourable conſtruction, founded on the uſage and practice of mankind, although it be unlawful by analogy, as being the ſale of a nonentity, which is prohibited.

Articles be-

turer, in a contract of *Sillim*, are conſidered as *entities*;

It is to be obſerved that a contract for workmanſhip is a *ſale* and not merely a *promiſe*. This is approved. The ſubject of the ſale, moreover, in ſuch caſe, although in reality a nonentity, is yet conſidered, in effect, as an *entity*; and the thing upon which the contract reſts is conſidered as a ſubſtance, (that is, as *boots*, for inſtance) and not as the work of a manufacturer in an *abſtracted* manner;—and accordingly, if the manufacturer bring boots that had been worked by another, or boots which he had himſelf worked prior to the contract, and the perſon who had beſpoke them ſhould approve of the ſame, the contract is legally fulfilled.—Beſides, articles that are beſpoken are not determined for the perſon who beſpoke them until he approve of them; and hence, if the workman ſhould ſell them to another before he had ſhewn them to this perſon, it is lawful.—All this is approved.

and may be rejected, if diſapproved, upon delivery.

WHOSOEVER beſpeaks goods of a workman has the option of taking or rejecting them, becauſe of his having purchaſed articles which he has not ſeen.—The workman, however, has no option, inſomuch that the perſon who beſpoke them may, if he pleaſe, take them from him by force.—This is recorded by *Mohammed*, in the *Mabſoot*, and is the moſt authentic doctrine.—It is related however, as an opinion of *Haneefa*, that the workman alſo has an opinion, inaſmuch as it is impoſſible for him to furniſh the articles beſpoken without detriment, ſince in order to make *boots*, (for inſtance,) it is neceſſary to purchaſe hides, and inſtruments to cut them, and this is not free from loſs. It is related, as an opinion of *Aboo Yooſaf*, that neither party poſſeſſes an option; for the workman, as being the *ſeller*, is not entitled to an option,—in the ſame manner as, in a ſale of goods unſeen, the ſeller hath no option; and with regard to the perſon who beſpeaks the goods, if an option were given to him it would be an injury to the ſeller, ſince if he rejected the goods other people might not chuſe to purchaſe them for the value;—as where, for inſtance, a commander of high rank beſpeaks goods, and the workman accordingly makes them in a ſtyle ſuitable to his rank, and he afterwards rejects them;—in which caſe the common rank of people would not purchaſe them for their value.

An engage-

goods which
it is not cuſ-
tomar
ſpeak
valid.

A CONTRACT with a workman for the furniſhing of goods is not lawful with reſpect to ſuch articles as it is not cuſtomary among mankind to beſpeak,—as *cloth* (for inſtance,) becauſe the beſpeaking of goods is in itſelf unlawful, and is therefore admitted by the law only ſo far as it is authorized by the cuſtom of mankind, which is conſidered as a neceſſary inſtrument of its legality.—It is alſo requiſite, in beſpeaking articles authorized by the cuſtom of mankind, to deſcribe their *quality*, in order to enable the workman to furniſh them accordingly; and unleſs ſuch deſcription be given, the contract is unlawful.—It is to be obſerved that the prohibition of a ſtipulation of a period for delivery, as recited in the firſt of theſe caſes relative to contracts of this kind, proceeds upon this ground, that if a period were ſtipulated in a contract for the ſupply of work of articles authorized by cuſtom, and the price paid immediately to the workman, it would then become a *Sillim* ſale in the opinion of *Aboo Yooſaf*: in oppoſition to that, however, of the two diſciples, who hold that it would ſtill remain merely a contract for the ſupply of work :—but if the period ſhould be ſtipulated in the caſe of articles not authorized by cuſtom, it then becomes a *Sillim* ſale in the opinions of all our doctors.—The reaſoning of the two diſciples in ſupport of their opinion in the firſt caſe is that the word *Iſtſinâ* literally means a *requiſition* of *workmanſhip*, and ought of conſequence to be uſed in that ſenſe, ſo long as the context does not determinate it to ſome other ſenſe.

Objection.—The ſtipulation of a period is a context which clearly indicates that *Iſtſinâ* is to be taken in a ſenſe different from its *literal* meaning; and that it is to be underſtood as implying a *Sillim* agreement; otherwiſe what need for the ſtipulation of a period?—It would therefore appear that in ſuch a caſe it amounts to a *Sillim.*

Reply.—The ſtipulation of a period, as in the firſt caſe, is not a convincing argument that the word *Iſtſinâ* is not to be taken in its literal ſenſe, but ought to be underſtood as implying an agreement of *Sillim*; becauſe the ſtipulation of a period may be ſuppoſed to have been made with a view *to expedition*,—and it may be ſuppoſed that the object of the beſpeaker, in fixing a period, was to prevent delays: in oppoſition to the caſe of things not authorized by cuſtom, for there a contract for a ſupply of workmanſhip, as being invalid, is conſtrued to mean a *Sillim* ſale, which is lawful.

——The reaſoning of *Haneefa* is that, when a period is ſtipulated, it fixes the ſubject of the ſale to be a *debt*, becauſe periods are not fixed except with regard to debts;—and the ſubject being proved to be a debt, the conſtruction of the contract into a *Sillim* ſale is eaſy and natural. It is therefore conſtrued to be a *Sillim* ſale, which is lawful, in the opinion of all our doctors, beyond a doubt; whereas, there is a doubt with reſpect to the other, ſince *practice* means the deeds of all people of all countries, and this can never be known with certainty: as, therefore, the legality of a *Sillim* ſale is certain, and practice is not free from doubt, it follows that it is preferable to conſtrue a contract for a ſupply of work to mean a contract of *Sillim*.

SECTION.

MISCELLANEOUS CASES.

It is lawful to

IT is lawful to ſell a dog or a hawk, whether trained or otherwiſe. It is related, as an opinion of *Aboo Yooſaf*, that the ſale of a dog that bites is not lawful;—and *Shafeï* has ſaid that the ſale of a dog is abſolutely illegal; becauſe the prophet has declared "*the wages of* "*whoredom, and the price of a dog, are in the number of prohibited* "*things*;" and alſo, becauſe a dog is actual filth, and is therefore deſerving of abhorrence; whereas the legality of ſale entitles the ſubject of it to reſpect; and is conſequently incompatible with the nature of a dog. The arguments of our doctors upon this point are twofold. FIRST, the prophet has prohibited the ſale of dogs, excepting ſuch as are trained to hunt or to watch.—SECONDLY, dogs are a ſpecies of property, inaſmuch as they are capable of yielding profit by means of hunting and watching; and being property, they are therefore fit ſubjects of ſale; in oppoſition to the caſe of *noxious* animals, ſuch as *ſnakes* or *ſcorpions*, which are not capable of yielding uſe. With reſpect to the tradition quoted by *Shafeï*, it applies to the infancy of *Iſlâm*, at which period the prophet prohibited every one from eating the price of a dog, in order to reſtrain men from a fondneſs for dogs, as it was then a cuſtom to keep dogs for breed, and to ſuffer them to ſleep on the ſame carpet. But when this cuſtom fell into diſuſe, and men abſtained from a fondneſs for dogs, the prophet ordained the ſale of them. With reſpect to the aſſertion of *Shafeï*, that dogs are *actual filth*, it is not admitted; but admitting this, ſtill it follows that the *eating*, and not the *ſelling* of them is unlawful.

It is not lawful to ſell *pork*.

The ſale of wine or pork is not lawful; becauſe, in the ſame manner as the prophet has prohibited the *eating* or *drinking* of theſe, ſo alſo has he prohibited the *ſale* of them, or the eating of the price of them; and alſo, becauſe theſe are not ſubſtantial property with regard to *Muſſulmans*, as has been before frequently explained.

Rules with reſpect to *Zimmees* in ſale.

Zimmees, in purchaſe and ſale, are the ſame as *Muſſulmans*;—becauſe the prophet has ſaid "*Be regardful of* Zimmees, *for they are* "*entitled to the ſame rights, and ſubject to the ſame rules with* Mus"sulmans;"—and alſo, becauſe, being under the ſame neceſſities, in the tranſaction of their concerns, as *Muſſulmans*, they ſtand in need of the ſame immunities. They are therefore the ſame as *Muſſulmans* with reſpect to purchaſe and ſale,—excepting, however, in the ſale of *wine* and *pork*, which is lawful to them, as the ſale of *wine*, by them, is conſidered in the ſame light with that of the crude juice of the grape by the *Muſſulmans*; and the ſale of pork by them is equivalent to that of the fleſh of a goat by *Muſſulmans*; becauſe theſe things are lawful in their belief, and we are commanded to ſuffer them to purſue their own tenets. Moreover, *Omar* commanded his agents to empower the *Zimmees* to ſell wine, taking from them a tenth part of the price: a proof that the ſale of wine is lawful among them.

IF a perſon ſay to another, "ſell your ſlave to a particular perſon "for one thouſand *dirms*, on condition that I be reſponſible to you for "five hundred *dirms* of the price, independant of the one thouſand "*dirms*," and the ſaid perſon act accordingly, it is valid, and he is entitled to one thouſand *dirms* from the purchaſer, and to five hundred *dirms* from the ſecurity; whereas, if he were ſimply to ſay, "I will "be reſponſible for five hundred *dirms*," without mentioning the words "of the price," the ſeller is, in that caſe, entitled only to the one thouſand *dirms* from the purchaſer, and has no claim on the ſurety.—The reaſon of this is, that an increaſe in the price, or in the wares, is lawful, according to all our doctors, and is joined to the original contract, (as has been already explained,) being only an alteration of the contract from one lawful quality to another lawful quality;—and as it is lawful for the *purchaſer* to make an alteration in the price, although he be no gainer in other reſpects by it, (as if he ſhould increaſe the price, notwithſtanding it be adequate to the value of the goods *before* the increaſe,) ſo alſo it is lawful for a ſtranger to lay himſelf under an obligation for an increaſe of price, although he have no advantage in other reſpects;—in the ſame manner as the conſideration for *Khoola* becomes incumbent upon a wife in virtue of her aſſent to the *Khoola*, although ſhe receive nothing in exchange, for woman is originally *free*, and the procurement of a divorce adds nothing to her original freedom. It is eſſential, therefore, to the validity of the ſeller's claim upon this perſon, that the increaſe be oppoſed to the goods by the ſpecification of the words "of the price;" and if theſe words be omitted, the declaration or ſtipulation is of no account.

A perſon i citing another t his property to a *third* perſon, by offering an addition over and above the price, is reſponſible for ſuch addition: but not unleſs this addition be expreſſed as forming a part of the price.

IF a perſon, having purchaſed a female ſlave, make her over in marriage to another before ſeizin, and that other cohabit with her, ſuch marriage is lawful, as having been concluded in virtue of the authority of the proprietor:—and it alſo determines the ſeizin of the purchaſer. If, however, the huſband ſhould not cohabit with her,

A female ſlave may be contracted in marriage by the purchaſer without his the marriage does not, in that caſe, determine the ſeizin according to a favourable conſtruction of the law.—Analogy, indeed, would ſuggeſt that the purchaſer becomes ſeized of the ſlave on the inſtant of the marriage-contract, ſince, in conſequence thereof, the right of property over the ſlave is rendered virtually defective;—it would therefore follow that the ſeizin becomes eſtabliſhed as an effect of the contract, in the ſame manner as in the caſe of an actual defect occaſioned by any act of a purchaſer.—The reaſon for a more favourable conſtruction, on this occaſion, is that any act by which an *actual* defect is occaſioned infers an exertion of power over the ſubject, which conſequently eſtabliſhed a ſeizin of the ſubject: but an act which merely induces a *virtual* defect does not admit of this inference, ſo as to eſtabliſh ſeizin.

Caſe of the purchaſer diſappearing, without taking poſſeſſion of his purchaſe, or paying the price:

If a perſon, having purchaſed a ſlave, ſhould afterwards abſent himſelf without taking poſſeſſion, or paying the price, and the ſeller prove by witneſſes that he had ſold the ſlave to the abſentee, in that caſe, provided the place of his retirement be known and aſcertained, the ſlave cannot be re-ſold on account of the exigences of the ſeller, for theſe may be otherwiſe anſwered, and ſuch ſale would deſtroy the right of the firſt purchaſer:—but if the abſentee's place of retirement be not known, the ſlave may be re-ſold, and the debt of the purchaſer to the ſeller paid by means of the price; for the ſeller has proved, by witneſſes, that the ſlave is the property of the purchaſer, and that he has a claim upon him; and conſequently, when the place of retirement of the purchaſer is unknown, it is incumbent on the magiſtrate to direct the ſlave to be ſold for the ſatisfaction of the ſeller, which could not otherwiſe be obtained;—in the ſame manner as where a pawner dies before having releaſed his pledge, in which caſe it is ſold for the diſcharge of his debt to the pawn-holder.—It is otherwiſe where the purchaſer diſappears *after* ſeizin, for in this caſe the ſlave cannot be ſold to anſwer the right of the ſeller, ſince his right is not particularly connected with the ſlave, as he, in ſuch a circumſtance, ſtands in the ſame predicament with the other creditors.—It is to be obſerved that, in caſe of the ſlave being ſold on account of the ſeller, if any thing remain after the diſcharge of his claim by means of the price, the ſeller muſt keep ſuch remainder in behalf of the purchaſer, to whom it is due as an exchange for his property:—but if the price ſhould not ſuffice to anſwer his claim, he is in that caſe entitled afterwards to the remainder from the purchaſer.—Suppoſing there be *two* purchaſers, and only *one* of them diſappear, the one that is preſent is entitled to pay the whole of the price of the ſlave, and to take complete poſſeſſion of him; and if, in this caſe, the other purchaſer afterward appear, he is not entitled to receive his ſhare until he ſhall have paid to his partner the price of it.—This is the adjudication of *Haneefa* and *Mohammed.* *Aboo Yooſaf* has ſaid that, if the *preſent* purchaſer pay the *whole* of the price, ſtill he is only entitled to take poſſeſſion of his own ſhare, and that, as the payment of the debt of the abſentee was a gratuitous and unſolicited act in his favour, he is not entitled to receive it from him, ſince he paid it without his authority. Beſides, as the preſent purchaſer is, as it were, a *ſtranger* with reſpect to the abſentee, he is not entitled to take poſſeſſion of his ſhare. The reaſoning of *Haneefa* is that the preſent purchaſer, in making payment on behalf of the abſentee, acted from *neceſſity*, and not from *choice*; becauſe it was not otherwiſe poſſible for him to enjoy his own ſhare, ſince, having purchaſed the ſlave jointly with the other by one contract, it was impoſſible for him to detain him in his poſſeſſion whilſt there exiſted the claim of another with reſpect to *part* of him. Now whoſoever pays the debt of another from neceſſity is entitled to repayment, notwithſtanding his having acted without authority; as in the caſe of the loan of a pledge; for if a perſon lend to another ſomething in order that he may pledge it, and that other having pledged it accordingly, the lender afterwards, from a neceſſary want of the ſaid thing, redeem it from the pawnee, he is, in ſuch caſe, entitled to repayment from the borrower, although he have redeemed the pledge without authority from him.—Since, therefore, the preſent

or of *one* of *two* purchaſers diſappearing

ſtance.

ſent purchaſer, in the caſe in queſtion, has a right to repayment from the abſentee, it follows that he has alſo a right to detain in his poſſeſſion the ſhare of the abſentee until he receive payment of the ſum due to him; in the ſame manner as an agent for purchaſe, who pays from his own property the price of the goods purchaſed on behalf of his conſtituent, is entitled to retain poſſeſſion of them until he receive payment of the price from his conſtituent.

Caſe of gold and ſilver being indefinitely mentioned in the offer of a price.

If a perſon purchaſe a female ſlave in exchange for one thouſand *miſkâls* of gold and ſilver,—ſaying "I purchaſe this ſlave for one thouſand *miſkâls* of gold and ſilver," in that caſe it is incumbent on him to pay five hundred *miſkâls* of gold, and five hundred *miſkâls* of ſilver; for the reference of the *miſkâl* to the gold and ſilver having been in an equal degree applicable to each, an equal proportion in the payment is of conſequence incumbent.—If, on the other hand, the purchaſer ſhould ſay, "I have purchaſed this ſlave in exchange for one thouſand "of gold and ſilver," in this caſe he muſt pay five hundred *miſkâls* of gold, and five hundred *dirms* of ſilver, (of the *ſeptimal* weight;) for the term *one thouſand* having been referred to the gold and ſilver in a general manner, it is therefore conſtrued to apply to the weight in common uſe with reſpect to each in particular.

The receipt of *baſe* money inſtead of *good* money, if it be loſt or expended, is a complete diſcharge.

If a perſon indebted to another in the amount of ten *dirms* of a good ſort, afterwards pay him this amount in an inferior ſpecies, and the other, being ignorant of this circumſtance, receive them, and afterwards expend them, or loſe them, in this caſe the debt is completely diſcharged, and the creditor is not entitled to any compenſation for the difference of quality.—This is according to *Haneefa* and *Mohammed*.—*Aboo Yooſaf* has ſaid, that in this caſe the creditor is entitled to return to the debtor a tantamount of *dirms* of the ſort he received, and to demand from him ten *dirms* of a ſuperior ſort, to which he has a right; becauſe, in the ſame manner as his right relates to

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the *ſubſtance* of the *dirms*, ſo alſo is it eſtabliſhed in the *quality*. A conſervation of *each* right is therefore indiſpenſable: but as the conſervation of the *ſecond* right, by means of an allowance in exchange for the difference of quality, is impracticable, (ſince quality in homogeneous articles is of no relative value,) this mode muſt neceſſarily be adopted. The reaſoning of *Haneefa* and *Mohammed* is, that the bad *dirms* are of the ſame ſpecies with the good; and that after the receipt and expenditure, or deſtruction of them, the debt is diſcharged; becauſe the claim which remains relates to quality, and this is impoſſible to ſatisfy by the granting of a compenſation, inaſmuch as quality in itſelf bears no value.

Articles of a *neutral* nature do not become property but by *actual ſeiz*

IF a bird incubate its eggs in the land of a particular perſon, the right of property over the brood does not, in virtue of ſuch incubation, veſt in the proprietor of the ground; on the contrary, they remain free to the perſon who ſhall firſt ſeize them.—The law is alſo the ſame with reſpect to eggs which a bird lays upon any particular ground.—So alſo, if a deer ſhould ſleep for a night in a field, it does not by that act become the property of the proprietor of that field; on the contrary, it remains free to whomſoever it may be caught by. The reaſon of this is, that both the young ones and the deer are conſidered in the nature of *game*, and as ſuch are free to the perſon who catches them, although no ſtratagem be uſed for that purpoſe;—and the ſame, alſo, of *eggs*; whence, if a *Mohrim* ſhould either break or broil them, he is ſubject to make expiation.—Moreover, the proprietor did not purpoſely prepare his land that the bird ſhould lay or incubate her eggs, or that the deer ſhould ſleep upon it.—It is therefore the ſame as if a perſon ſhould ſpread out his net for the purpoſe of drying it, in which caſe, if any game ſhould fall into it, it would not become immediately the property of the proprietor of the net, but would continue neutral until ſome one ſeize it;—or, as if game ſhould come into a houſe, in which caſe it does not become the immediate property of the proprietor of the houſe;—or, as if a perſon, ſcattering *ſugar* or *dirms* (for inſtance) among the people, ſhould chance to throw theſe into the clothes of ſome one; in which caſe the property does not immediately veſt in that perſon, until he wrap it up or prepare to ſeize it.—It is otherwiſe with reſpect to *honey*, for the property of it veſts in the proprietor of the ground in which it is gathered together; becauſe honey is conſidered as the produce of the ground, and hence the proprietor of the ground obtains a property in it as a dependant of the ſoil, in the ſame manner as in the trees which grow in his land, or in water which flows through it.

HEDÂYA.

BOOK XVII.

Of SIRF SALE.

Definition of *Sirf* ſale.

BEEYA SIRF means a *pure* ſale, of which the articles oppoſed in exchange to each other are both repreſentatives of price. This is termed *Sirf*, becauſe *Sirf* means a *removal*, and in this mode of ſale it is neceſſary to remove the articles oppoſed to each other in exchange from the hands of each of the parties, reſpectively, into thoſe of the other. *Sirf* alſo means a *ſuperiority*; and in this kind of ſale a ſuperiority is the only object; that is, a ſuperiority of quality, faſhion, or workmanſhip; for gold or ſilver being, with reſpect to their ſubſtance, of no uſe, are only deſireable from ſuch ſuperiority.

The articles oppoſed muſt be exactly equal in point of *weight*; but may differ in *quality*.

THE ſale of *gold* for *gold*, or *ſilver* for *ſilver*, is permitted only when they are exactly equal in point of weight: but the one may be of a ſuperior quality to the other; or the one may be bullion, and the other may be *wrought*; becauſe the prophet has ſaid "*Sell* GOLD *for* "GOLD, *from hand to hand, at an equal rate according to weight; for* "*any inequality in point of weight is* USURY." And he has alſo declared "*the* GOODNESS *and* BADNESS *of the quality is the ſame*," (as has been already explained in the preceding book treating

The exchange muſt take place upon the ſpot.

MUTUAL ſeizin is an indiſpenſable requiſite in a *Sirf* ſale;—that is, it is indiſpenſable that each of the parties, prior to their departure from the meeting, take poſſeſſion of the article reſpectively given in exchange; becauſe of the tradition above quoted; and alſo, becauſe *Omar* ſaid to one of the parties in a *Sirf* ſale, "*If the other party re-*"*quire leave to go to his houſe, yet you muſt not grant it.*"—Beſides, the ſeizin of one of the parties is an indiſpenſable requiſite, leſt the contract prove to be an exchange of a debt for a debt:—and as the ſeizin of *one* of the parties is requiſite, it follows that, in order to eſtabliſh an equality, the ſeizin of the other is alſo requiſite, ſince uſury would otherwiſe be induced. In a ſale of this nature, moreover, neither ſubject has a *priority* with reſpect to the other; and hence a *mutual* ſeizin is requiſite, whether both the ſubjects be of a *determinate* nature, (as in the ſale of *one* ſilver veſſel for *another* ſilver veſſel,) or of a nature *not* determinate, (as in the ſale of *dirms* and *deenars* in exchange for *dirms* and *deenars*,) or one of them determinate and the other not, (as in the ſale of a ſilver veſſel in exchange for *dirms* and *deenars*;) becauſe the tradition enjoining a mutual ſeizin is abſolute, and makes no diſcrimination of theſe circumſtances.—Beſides, although a ſilver veſſel be determinate, ſtill there ſubſiſts a doubt with reſpect to its determination, inaſmuch as ſilver is conſidered in its nature as a repreſentative of price; and, in a caſe of this nature, a doubt is a ſufficient cauſe for the neceſſity of ſeizin, becauſe a *doubt*, in matters relative to uſury, is equivalent to a *reality*.—It is to be obſerved that what is meant by *mutual ſeizin*, is that both parties make ſeizin prior to their ſeparation; whence if the parties walk aſide together, or ſleep in the place of meeting, or become inſenſible, the *Sirf* ſale is not thereby rendered null, becauſe *Omar* has ſaid "*If the ſeller, in a* SIRF *ſale, ſhould leap from the top of the* "*houſe, do you leap after*

Gold may be ſold for ſilver, at an unequal rate, provided the exchange take place upon the ſpot.

THE ſale of gold in exchange for ſilver, at an unequal rate, is permitted, becauſe theſe articles are of a different genus. Still, however, in ſuch caſe, mutual ſeizin is indiſpenſible, becauſe the prophet has ſaid, "*The ſale of gold for ſilver is uſury unleſs it be from hand to* "*hand*." If, therefore, the parties ſeparate before *both* or *one* of them make ſeizin, the ſale is invalid; and hence it is not lawful to ſtipulate an optional condition, or an optional period, becauſe ſuch ſtipulations are preventive of mutual ſeizin, which is an indiſpenſible condition. If, however, a *Sirf* ſale be contracted with an optional condition, and the condition be afterwards removed previous to the ſeparation of the parties, the *Sirf* ſale is in that caſe valid, becauſe of the cauſe of its invalidity being deſtroyed previous to its complete eſtabliſhment.

No act can be performed with relation to the return until it be received.

ANY deed with reſpect to the return, in a *Sirf* ſale, previous to ſeizin of it, is unlawful. If, therefore, a perſon, having ſold a *deenar* for ten *dirms*, ſhould, previous to the ſeizin of them, purchaſe a piece of cloth for them, in that caſe the ſale of the cloth is invalid, on this principle, that the ſeizin of the ten *dirms* was abſolutely incumbent; becauſe otherwiſe the *Sirf* ſale would be uſurious; and as GOD has prohibited uſury, it follows that if the ſale of the cloth were licenſed, an abſolute commandment of God would thereby be defeated.—It is related, as an opinion of *Ziffer*, that the ſale of the cloth is capable of being rendered valid; becauſe *dirms* being undeterminate, it follows that the price of the cloth relates to ten *dirms* in an *abſolute* manner, and not to the ten *dirms* of the *Sirf* ſale in a *ſpecific* manner. Our doctors, on the other hand, argue that *price*, in a *Sirf* ſale, is alſo a ſubject of the ſale; becauſe, as every ſale muſt have a ſubject, and as the articles, in a *Sirf* ſale, are both repreſentatives of price, without any of them having a preference over the other, it follows that either of them is the ſubject; and the ſale of the ſubject previous to the ſeizin is unlawful.

Objection.—The conſideration, in a *Sirf* ſale, is a repreſentative of price, and therefore of an undeterminate nature; whence it would follow that it cannot be conſidered as the ſubject, ſince the *ſubject* of a ſale is required to be *determinate*.

Reply.—The ſubject of a ſale is not required to be determinate; for, in a *Sillim* ſale, the thing on account of which the advance is made is the ſubject of the ſale; but ſtill it is undeterminate.

Gold may be ſold for ſilver, &c; but not gold for gold, nor for ſilver.

The ſale of gold for ſilver, by conjecture*, is lawful, becauſe equality, in a ſale of this nature, is not required.—It is unlawful, however, to ſell *gold* for *gold*, or *ſilver* for *ſilver*, by conjecture, becauſe in ſuch ſale there is a ſuſpicion of uſury.

In the ſale of an article having any gold or ſilver upon it, the price paid down is oppoſed to the gold or ſilver.

If a perſon ſell, for two thouſand *Miſkâls* of ſilver, a female ſlave whoſe real value is one thouſand *Miſkâls*, and on whoſe neck there is a collar of ſilver equivalent to one thouſand *Miſkâls* of ſilver, and the purchaſer having paid a thouſand *Miſkâls* of ſilver, ready money, the parties then ſeparate from the meeting, ſuch payment is conſidered to be the price of the collar, becauſe the ſeizin of ſo much of the price of the whole was a neceſſary condition, as the ſale in that proportion was a *Sirf* ſale; and hence it is reaſonable to conclude that the ſeller paid the exact amount of which he knew the ſeizin to be indiſpenſibly neceſſary. In the ſame manner, alſo, if he purchaſe the ſaid ſlave with the collar, for two thouſand *Miſkâls* of ſilver, of which one thouſand is prompt and the other thouſand poſtponed, the prompt payment is conſidered as the price of the collar, becauſe the ſtipulation of payment at a future period not being lawful in a *Sirf* ſale, and being permitted in the ſale of a ſlave, it is reaſonable to ſuppoſe that the parties, in contracting the ſale, and ſtipulating the diſtant period, intended to proceed according to law. —If, alſo, a perſon ſell, for one hundred *dirms*, a ſword, of which the ſilver ornaments amount to fifty *dirms*, and the purchaſer pay immediately fifty *dirms* of the price in prompt payment, ſuch ſale is lawful, and the payment made is conſidered to be for the price of the ornaments, although the purchaſer may not have ſpecified this.—The ſame rule, alſo, holds if the purchaſer ſay to the ſeller, "Take theſe "fifty *dirms* in part of the price of *both*," (that is, of the ornaments and ſword,) becauſe two things are ſometimes mentioned where only one is intended, and this ſuppoſition is here adopted from the probability of it. If, however, the parties ſeparate without a mutual ſeizin, the ſale is null with reſpect to the ſilver ornaments, becauſe of its being in that degree a *Sirf* ſale, to the validity of which mutual ſeizin is eſſential:—or, if the ſword be ſo framed as not to admit a ſeparation of the ornaments without ſuſtaining detriment, the ſale of it is in this caſe alſo null, becauſe ſo ſituated the ſeparate ſale of it is not permitted, in the ſame manner as it is not permitted to ſell the beam of a roof.—If, on the other hand, the ſword admit of a ſeparation of the ornaments, without detriment, the ſale, in the manner above-mentioned, is valid with reſpect to the *ſword*; but with reſpect to the *ornament* it is null.—It is to be obſerved that the ſale of a ſword with ſilver ornaments in exchange for *dirms* is lawful only where the ſilver of the *dirms* exceeds that of the ornaments; and that, if the ſilver of the *dirms* be either barely *equal* to, or *leſs* than, that of the ornaments,—or, if it be not *known* whether it be more or leſs, the ſale is invalid. The reaſon of the invalidity in caſe of its not being known whether it be more or leſs is, that the probability is in favour of its being invalid; ſince there are two cauſes of invalidity, namely, *equality* and *inferiority*; whereas there is only *one* cauſe of validity, viz. *ſuperiority*.

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* That is, by a looſe undeterminate eſtimate.

In the purchaſe of plate, if the parties ſeparate before payment of the full price, the ſale is valid only in the proportion paid;

If a perſon, having ſold to another a ſilver veſſel, ſhould receive payment in part, and both parties then ſeparate, in that caſe the ſale is null with reſpect to the amount remaining to be paid, but valid in the amount taken poſſeſſion of; and the parties have each a ſhare in the property of the veſſel;—becauſe this ſale is *Sirf*, or *pure*, with regard to the whole of the ſubject, and conſequently valid in that degree in which the conditions of a pure ſale have been obſerved, and invalid in the degree in which they have been omitted; for the invalidity, in this caſe, is not *eſſential*, but *accidental*, inaſmuch as the ſale was valid in its formation, and afterwards, in conſequence of the ſeparation of the parties after the receipt of a *part*, became invalid with relation to part of the ſubject; and hence the invalidity, which is accidental, does not operate upon the part in which all the conditions of the ſale have been obſerved.

or, if it be

property of another, the purchaſer

gain:

If a perſon ſell a ſilver veſſel which afterwards appears to be in part the property of another, in that caſe the purchaſer has the option either of retaining a right of property in the remaining part of the veſſel, or of cancelling the bargain entirely; becauſe

in a veſſel is equivalent to a *blemiſh* in it.

(but this does not hold

If a perſon ſell an ingot of ſilver, and part of it afterwards appears to be the property of another, the purchaſer is in that caſe conſtrained to take the remaining part at a proportionate price:—and he is not allowed an option, in this inſtance, becauſe the diviſion of an ingot of ſilver does not in any ſhape injure it.

Where the

ſpecies of mo- the ſale at an unequal rate is lawful;

The ſale of two *dirms* and one *deenar*, in exchange for two *deenars* and one *dirm*, is valid; becauſe in this caſe the *dirms* are conſidered as oppoſed to the *deenars*; and as they are of a different genus, an inequality in the proportion is therefore admitted. *Shafeï* and *Ziffer* main-

that this ſale is unlawful; and they have diſagreed in the ſame manner with reſpect to the legality of the ſale of one *Koor* of barley one *Koor* of wheat in exchange for two *Koors* of wheat and two *Koors* of barley. Their reaſoning in ſupport of their opinion is that the ſeller and buyer have oppoſed one total to another total; and this requires that every ſeparate part of the one be oppoſed to every ſeparate part of the other, (in an *indefinite* and not a *definite* manner;)—now in the oppoſing of each genus, reſpectively, to a different genus, a modification is induced in this particular, which is not lawful, notwithſtanding ſuch a conſtruction of the ſale be the means of rendering it valid.—In the ſame manner as where a perſon, for ten *dirms*, purchaſes a ſilver bracelet weighing ten *dirms*, and again, for other ten *dirms*, purchaſes a piece of cloth, and then diſpoſes of both articles together, by a *Moorâbihat* contract, (ſuppoſe) for thirty *dirms*, in which caſe the *Moorâbihat* ſale is invalid, although it be poſſible, by ſuppoſing the whole of the profit to be exacted on the *cloth*, to render it valid:—or, where a perſon purchaſes a ſlave for one thouſand *dirms*, and, previous to the payment of the price, ſells him, along with another, for fifteen hundred *dirms*, to the perſon from whom he had bought the ſlave for one thouſand *dirms*; for in this caſe the ſale is invalid in relation to the ſlave of a thouſand *dirms*, becauſe there is a poſſibility that the other ſlave may have been worth more than five hundred *dirms*; and ſuppoſing this, it neceſſarily follows that the ſeller has purchaſed the ſlave for a ſmaller price than that for which he formerly ſold him; although in this caſe it be poſſible to render the ſale valid by ſuppoſing the one ſlave to be oppoſed to one thouſand *dirms*, in a ſpecific manner, and the other to five hundred *dirms*, ſo as to remove the poſſibility of the ſeller having received him at a ſmaller price than that for which he had ſold him:—or, where a ſeller, having exhibited two ſlaves, of which *one* only is his property, ſays to the purchaſer, "I have ſold to you one of theſe ſlaves," in which caſe the ſale is invalid, notwithſtanding it be poſſible to render it valid by ſuppoſing that the ſeller meant his own ſlave:—or, where a perſon ſells a *dirm* and a piece of cloth for a *dirm* and a piece of cloth, and both parties then ſeparate without making ſeizin,—in which caſe the ſale is invalid

valid, although it be poſſible to render it valid by ſuppoſing the *dirms* on each ſide to have been oppoſed to the cloth of the other :—for, in all theſe caſes, although there be a poſſibility of rendering the ſales valid, ſtill they remain invalid, for the reaſon already alledged. The arguments of our doctors are, that the oppoſition of a total to a total, provided it be in an *abſolute* manner, (that is, without any particular ſpecification,) admits of this ſuppoſition, that the ſeparate parts are oppoſed to the ſeparate parts;—as in the caſe of an *homogeneous* ſale, for inſtance, ſuch as a ſale of two *dirms* for two *dirms*, in which the unities on each ſide are oppoſed to thoſe on the other reſpectively; whence if each of the contracting parties reſpectively take *one dirm*, and they then ſeparate from the meeting, the ſale is valid to the amount ſeized;—whereas, if the ſeparate parts of the ſubject of the ſale, inſtead of being oppoſed to each other in a *definite* manner, ſhould be oppoſed to each other in an *indefinite* manner, the ſale in the amount ſeized would not be lawful, ſince it muſt neceſſarily follow that the amount ſeized by each of the parties would ſtand oppoſed, indefinitely, to what *was* ſeized and what was *not* ſeized.—It is therefore evident that the oppoſition of a total to a total infers the oppoſition of the unities reſpectively; and as this, to give validity to the contract in queſtion, muſt be in a *definite* manner, it is *preſumed* to be ſo, in order that the contract may be valid.—With reſpect to what *Ziffer* and *Shafeï* urge, that "a modification is induced with regard to the requiſites of the contract," we reply, that a modification is induced with reſpect to the *quality* of the contract, but not with reſpect to the original requiſites of it, becauſe the original requiſite of the contract is that a total ſhall be transferred in exchange for a total, and this continues unaltered.—Analagous to this is a caſe where a perſon ſells the half of a ſlave, ſhared in an equal degree between him and another; for in that caſe the law ſuppoſes the ſale to apply to his *own* ſhare, in order to its validity. The caſes enumerated by *Ziffer* and *Shafeï*, on the contrary, are not analogous to this in queſtion.—The *firſt* caſe (namely, that of a *Moorâbihat* ſale) is not analogous, as it is not poſſible to ſuppoſe that the whole of the profit is exacted on the *cloth*, for, if ſo, the ſale of the bracelet would be rendered a ſale of *friendſhip*, and hence an alteration would take place in the eſſence of the contract. The *ſecond* caſe, alſo, is not analogous, becauſe the mode there propoſed for legalizing the ſale is not determinate, ſince in the ſame manner as it is poſſible to conſtrue the ſum oppoſed to the ſlave to be one thouſand *dirms*, ſo alſo is it poſſible to conſtrue it to be *more* than one thouſand, in every different gradation, until it amount to one thouſand four hundred and ninety-nine *dirms*: in oppoſition to the caſe in queſtion, where the mode propoſed is *determinate*. The *third* inſtance, alſo, is not analogous, becauſe the force of the ſale there reſts upon an indefinite object, which is incapable of being the ſubject of ſale; and as *indefinity* and *ſpecification* are of oppoſite import, it is impoſſible to conſtrue the ſale as applicable to any ſpecific article. In the *laſt* inſtance, on the other hand, the ſale is originally valid, and becomes otherwiſe from an accident, namely, the ſeparation of the meeting: but the preſent queſtion relates to a contract in its *original formation*, and not to any *adventitious* circumſtances.

and ſo alſo,

of a certain number of coins of *one* ſpecies, and, on the other, of an equal number, of *two* ſpecies.

A SALE of eleven *dirms* in exchange for ten *dirms* and one *deenar*, is valid:—and in this caſe ten *dirms* are conſidered as oppoſed to ten *dirms*, and the remaining *dirm* to the ſingle *deenar*; becauſe in a ſale of *dirms* for *dirms* equality is indiſpenſible, and it is therefore reaſonable to ſuppoſe that ſuch was the intention of the parties; and with reſpect to the remaining part of the ſale, namely, the oppoſition of one *dirm* to one *deenar*, equality is not requiſite, as they are not homogeneous.

A deficiency of value, on one ſide, in *weight*, may be made up by the addition of any other article of proportionable value.

IF, in a ſale of gold for gold, or ſilver for ſilver, the ſubject, on one part, be inferior in point of weight to the other, and there be joined to the inferior ſomething equal in value to the deficiency ariſing from the difference of weight, in this caſe the ſale is valid, without being abominable. If, on the other hand, the value of the thing ſo added be not equal to the difference, ſtill the ſale is valid, but abominable. But if, on the contrary, the additional thing bear no value, (ſuch as *duſt*, for inſtance) the ſale is not valid, becauſe of its being uſurious, inaſmuch as nothing is oppoſed to the difference of the weight.

A *debt* may be commuted in the courſe of a *Sirf* ſale.

If a perſon, indebted to another to the amount of ten *dirms*, ſell to his creditor one *deenar* for ten *dirms*, and having delivered the *deenar* to him, the parties then commute the ten *dirms* which they reciprocally owe to each other, it is lawful. This caſe, however, ſuppoſes the ſale of the *deenar* to relate to ten *dirms* in an *abſolute* manner, and not to the debt.

and
irms
ld
for two *baſe*
and one *pure.*

The ſale of one pure *dirm* and two baſe ones in exchange for two pure *dirms* and one baſe one, is lawful.—By a *baſe dirm* is to be underſtood, ſuch as paſſes amongſt merchants, but is rejected at the public treaſury.—The reaſon of the legality, in this inſtance, is that an equality according to *weight* is eſtabliſhed, and the quality of *purity* is of no account.

Deſcription of, and rules reſpecting, baſe coinage.

Dirms in which the *ſilver* is predominant are conſidered as ſilver, and *deenars* in which the *gold* is predominant are conſidered as *gold*; and a difference in the proportion with reſpect to them in a ſale is conſequently unlawful, in the ſame manner as in the caſe of pure *dirms* or *deenars*. Hence it is unlawful either to ſell *baſe* money in exchange for *pure*, or *baſe* in exchange for *baſe*, unleſs upon a footing of equality in regard to weight.—In the ſame manner, alſo, it is unlawful to *borrow* baſe money except according to weight: for *dirms* and *deenars*, in common, are not free from a mixture of baſe metal; becauſe gold and ſilver do not receive the impreſſion well without a mixture of it, and it is ſometimes *innate* in them.

If, however, in *dirms* and *deenars*, the baſe metal predominate, they are not, in effect, *dirms* and *deenars*, becauſe the law adverts to the predominancy. Hence if a perſon ſhould purchaſe pure ſilver in exchange for *dirms* of that nature, the law is the ſame as has been already ſtated in the caſe of a ſword with ſilver ornaments. It is lawful, moreover, to ſell *dirms* and *deenars* of this nature in exchange for others of the ſame kind, at an unequal proportion; for as theſe conſiſt of two different materials, (namely, *gold* and baſe metal, or *ſilver* and baſe metal,) one genus may therefore be oppoſed to another.—This, however, is nevertheleſs a *Sirf* ſale, becauſe of there being an oppoſition of gold or ſilver on each ſide; and hence mutual ſeizin in the meeting is neceſſary: and in the ſame manner as ſeizin of the *ſilver* or *gold* is neceſſary in the meeting, ſo alſo is that of the *baſe* metal, becauſe a ſeparation cannot be effected without detriment. —The compiler of the *Hedâya* obſerves that the modern lawyers of his country * do not paſs decrees agreeably to this doctrine; for as baſe money is there much in uſe, it follows that if the ſale of it at an unequal proportion were permitted, the door of uſury would thereby be opened.

WITH reſpect to money in which the baſe metal predominates, it is to be remarked that, if it paſs current by weight, purchaſe, ſale, and loans are tranſacted in it by *weight*. If, on the other hand, it paſs current by *tale*, all matters are tranſacted in it by *tale*.—If, however, *both* modes prevail, it is in that caſe permitted to follow either; for cuſtom is deciſive with reſpect to matters of this kind, provided they be not otherwiſe determined by the ordinances of the LAW.—It is alſo to be obſerved that money of this kind, whilſt it continues in uſe, is a repreſentative of price, and is therefore incapable of being rendered determinate: but if it ſhould not be in uſe, it is conſidered as other wares or articles of merchandize, and is therefore capable of being rendered determinate.

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* *Mawur al Nihr.*

If *dirms* be adulterated to ſuch a degree as to paſs current with *ſome*, but not with *others*, they are equivalent to *Zeyf* or *baſe dirms*. Hence, if a perſon enter into a contract for ſomething in exchange for a hundred ſpecific *dirms* of this deſcription, the contract does not relate to thoſe ſpecific *dirms* in particular, but to a ſimilar amount of baſe *dirms*, provided the ſeller were aware of the circumſtance;—but if otherwiſe, it relates to a ſimilar number of pure *dirms*;—becauſe in the *firſt* caſe the aſſent of the ſeller to receive the *baſe* ſpecies is eſtabliſhed by his knowledge of the baſeneſs,—whereas in the *ſecond* caſe his aſſent is uneſtabliſhed becauſe of his *ignorance* of the baſeneſs.

A ſale for baſe *dirms* is loſe their currency before the period of payment.

If a perſon purchaſe wares in exchange for baſe *dirms*, and, previous to the payment of them, they ſhould fall into general diſuſe, in that caſe the ſale, according to *Haneeſa*, is null. *Aboo Yooſaf* maintains that it is incumbent on the purchaſer to pay the value which theſe *dirms* bore on the day of ſale. *Mohammed*, on the other hand, alledges that it is incumbent on him to pay the value which they bore on the laſt day of their currency. The arguments of the two diſciples are that the contract in itſelf is valid; but the delivery of the *dirms* becomes impracticable from the diſuſe of them; a circumſtance, however, which does not induce invalidity;—any more than where a perſon purchaſes an article for *freſh dates*, and the ſeaſon for thoſe paſſes away;—in which caſe the ſale is not invalid; and ſo alſo in the caſe in queſtion.—As, therefore, the contract is not invalid, but ſtill endures, it follows that, according to *Aboo Yooſaf*, the value the *dirms* bore at the time of the ſale is due, becauſe from that period reſponſibility for them takes place; in the ſame manner as in a caſe of uſurpation;—and that, according to *Mohammed*, (on the other hand) the value they bore on the laſt day of their currency is due, ſince at that period the right of the ſeller ſhifted from *them* to their *value*.—The argument of *Haneeſa* is, that the price is deſtroyed by the diſuſe; for money is the repreſentative of price ſolely from cuſtom, and hence this property is annulled from diſuſe. The ſale, therefore, remains without any *price* being involved in it, and is conſequently null; and as the *ſale* is null, it is of courſe incumbent on the purchaſer to reſtore the goods to the ſeller, provided they be extant; or, if otherwiſe, the value which they bore on the day he obtained poſſeſſion of them; in the ſame manner as in an *invalid* ſale.

Rules with

A SALE in exchange for *Faloos* is valid, becauſe they are conſidered as durable property. If, therefore, the *Faloos* paſs in currency, the ſale is lawful, although they may not have been ſpecified,—becauſe *Faloos* are, from cuſtom, repreſentatives of price, and conſequently ſtand not in need of ſpecification. If, however, they ſhould not paſs in currency, it is in that caſe requiſite that they be particularly ſpecified, in the ſame manner as other articles of merchandize.

IF a perſon purchaſe wares for *Faloos*, which at that time paſſed in currency, but which previous to the payment of them fall into diſuſe, the ſale is in that caſe null, according to *Haneefa:* contrary, however, to the opinion of the two diſciples.—The difference of opinion upon this point is analogous to what has been already mentioned in treating of *dirms* in which the alloy is predominant.

IF a perſon borrow *Faloos*, and their currency ſhould afterwards ceaſe, then, according to *Haneefa*, the borrower muſt make repayment in ſimilars*; becauſe *Karz* [a loan of *money*] is equivalent to *Areeat* [a loan of *ſubſtance*,] and therefore requires the reſtoration of the actual article with reſpect to its *nature*, that is, its *value*.—The property of repreſenting price, moreover, is merely an *adventitious* property, in copper coin, to which no regard is had in the borrowing of them; on the contrary, they are borrowed on the principle

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[*] By *ſimilars* is always underſtood any articles compenſable by an equal number of the ſame deſcription, ſuch as *eggs* for *eggs*, *Faloos* for *Faloos*, &c. It is treated of at large in various other parts of the work.

of their being *ſimilars*; and this quality they retain after the diſuſe of them as money, whence it is that a loan in them is valid after they have loſt their currency.—According to the two diſciples, on the contrary, the borrower muſt in this caſe pay to the lender the *value* of the *Faloos*; for their quality of repreſentation of price being annulled by the diſuſe, it is therefore impracticable for the borrower to reſtore them with the qualities they poſſeſſed when he received them; and hence, as the payment of *ſimilars* would be an injury, it is required that he pay the *value*; in the ſame manner as holds where a perſon borrows any articles of which the unities are ſimilar, and the whole genus of which afterwards becomes extinct.—According to *Aboo Yooſaf*, their value muſt be fixed from the day of ſeizin; and according to *Mohammed*, from the laſt day of their currency, in conformity with what has been already explained. This difference of opinion originates in a difference of doctrine reſpecting a caſe where a perſon *uſurps* an article of the claſs of ſimilars, and of which the ſimilars afterwards become extinct[*], when, according to *Aboo Yooſaf*, the uſurper is reſponſible for the value the article bore on the day of uſurpation; and, according to *Mohammed*, for the value it bore on the laſt day of its exiſtence.—It is to be obſerved that the opinion of *Mohammed* is founded upon tenderneſs to mankind, and that of *Aboo Yooſaf* on *conveniency*.

It is lawful for a perſon to purchaſe any thing in exchange for a half *dirm* of *Faloos*[†]; and in this caſe he is required to pay the number of *Faloos* adequate to the price of half a *dirm*.—In the ſame manner, it is lawful to purchaſe any thing for the *Faloos* of a *dânik*[‡] of ſilver, or a *Kerât*[*] of ſilver.—In all theſe caſes, *Ziffer* is of opinion that the bargain is unlawful, becauſe *Faloos* being an article of tale, eſtimated by number and not by their relation to *dirms* or *dâniks*, a ſpecification of the number ought therefore to have been made.—The reaſoning of our doctors is, that the exact number of *Faloos* adequate to the price of a half *dirm*, or a *dânik*, is known, (for the caſe in queſtion proceeds on the ſuppoſition of ſuch a knowledge,) and that a ſpecification of the number is therefore unneceſſary.—If the purchaſer were to ſay, " I have bought this thing for the *Faloos* of one " *dirm*, or two *dirms*," the bargain in that caſe alſo is valid, according to *Aboo Yooſaf*; for this expreſſion means the *number* of *Faloos* to which the price of one or two *dirms* is adequate, and not the *weight*. —It is related as an opinion of *Mohammed*, that a ſale for the *Faloos* of one *dirm* is not lawful; but that a ſale for the *Faloos* of any thing *under* a *dirm* is lawful, as it is cuſtomary to purchaſe things for *Faloos*, where the value is not adequate to a *dirm*, but not otherwiſe. Lawyers have obſerved, that the opinion of *Aboo Yooſaf* is the moſt approved, eſpecially in countries where the practice of ſelling and purchaſing for *Faloos* is common, and where, of courſe, the rate they bear, with reſpect to *dirms*, is known and aſcertained.

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[*] Such as *fruits*, or other articles which are to be had only at particular ſeaſons of the year.

[†] That is, For *Faloos* to the value of half a *dirm*.—(The diſtinction, in this inſtance, turns entirely upon the nature of the phraſe in the original idiom.)

[‡] A ſmall copper coin, the ſixth part of a *dirm*.

If a perſon, having delivered a *dirm* to a *Sirrâf*, or money changer, ſhould ſay to him, " Give me *Faloos* in exchange for one half of this, " and a half *dirm* wanting one grain of ſilver in exchange for the " other half," in this caſe the ſale, according to the two diſciples, is valid with reſpect to the one half in exchange for *Faloos*, and invalid with reſpect to the other; becauſe the ſale of a half *dirm* in exchange for *Faloos* is lawful (as has been already explained;) but the exchange of a half *dirm* in exchange for a half *dirm* wanting one grain of ſilver, is uſurious, and conſequently unlawful. Agreeably to the tenets of

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[*] A *Carat*, the twenty-fourth part of an ounce.

Haneefa, the ſale is in this caſe completely null, becauſe the whole is comprehended under one contract, and the invalidity being ſtrong, with reſpect to a *part*, does therefore communicate itſelf to the whole. If, however, the word "Give" be repeated, by the perſon ſaying, "Give me *Faloos* in exchange for *one* half, and give me a half *dirm* "wanting one grain in exchange for the *other* half," the opinion of *Haneefa*, in ſuch caſe, accords with that of the two diſciples, becauſe here exiſt two ſeparate ſales, one valid, and the other invalid. —If the purchaſer, without oppoſing the halves of the *dirm*, were to ſay, "Give me, in exchange for this *dirm*, the *Faloos* of half a *dirm*, "and a half *dirm* wanting one grain;" the ſale is valid in full, becauſe, in this caſe, it is conſtrued to be an oppoſition, on the one hand, of one half *dirm* wanting a grain in exchange for one half *dirm* wanting a grain; and on the other, of a half *dirm* with the ſuperaddition of a grain for the *Faloos* of a half *dirm*; and this is lawful.

HEDÂYA.

BOOK XVIII.

Of *Kafâlit*, or *Bail.*

Definition of th in

KAFÂLIT literally means *junction.* In the language of the LAW it ſignifies the junction of one perſon to another in relation to a *claim:* (ſome have ſaid, in relation to a *debt* only; but the firſt is the moſt approved definition.)—The perſon who renders obligatory on himſelf the claim of another, whether it relate to perſon or property, is termed the *Kafeel,* or ſurety:—the claim itſelf, in favour of which bail is given, whether it relate to the perſon or property, is termed *Makfool-be-hee:*—the claimant is termed *Makfool-le-hoo;* and the principal, or perſon who gives bail, is termed *Makfool-an-hoo.*—In caſes of bail for the *perſon,* however, the terms *Makfool-be-hee* and *Makfool-an-hoo* relate to the ſame thing.

Chap. I. Introductory.
Chap. II. Of Bail in which two are concerned.
Chap. III. Of Bail by *Freemen* in behalf of *Slaves*, and by *Slaves* in behalf of *Freemen*.

CHAP. I.

Diſtinctions. BAIL is of two deſcriptions. I. *Bail for the perſon*, which is termed *Hâzir-Zâminee*. II. *Bail for property*, which is termed *Mâl-Zâminee*.

Bail for the perſon, BAIL for the *perſon* is valid; and in virtue of it the ſurety is bound to produce the principal, or perſon whom he has bailed.—*Shafeï* is of opinion that bail for the perſon is not valid, becauſe the ſurety undertakes and renders obligatory on himſelf a delivery which he is not capable of performing, inaſmuch as he poſſeſſes no power or authority over the perſon of the principal: contrary to bail for *property*, as in that caſe the ſurety poſſeſſing power and authority over his own property is thereby enabled to diſcharge the obligation he has contracted.—The arguments of our doctors upon this point are twofold. FIRST, the prophet has ſaid "*The ſurety is reſponſible*," which is a proof that both modes of bail are lawful. SECONDLY, the ſurety is in a degree capable of delivering the perſon for whom he is bail, as he may inform the claimant of his place of abode, and thus remove the bar between them, ſince, after obtaining ſuch knowledge, the claimant may demand the aid of the officers of the *Kazee*, by whoſe means he may ſecure his preſence. There is, moreover, a neceſſity amongſt mankind for this kind of bail; and the characteriſtic of bail, namely, a junction of one perſon to another in relation to a claim, is obſerved in it.

Bail for the perſon is contracted, where any one ſays; "I have become bail for the *perſon* of a particular man," or, "for his *neck*," or "for his *ſoul*," or "for his *body*," or "for his *head*," or "for his *face*;" becauſe ſome of theſe words really mean, in their common acceptation, the *whole* of the perſon, and others bear that ſenſe metaphorically, as has been already explained under the head of divorce.—The effect is alſo the ſame when a perſon ſays, "I have become bail for the *half* of a certain perſon," or "for a *third* of him," or "for a *part* of him;" becauſe the perſon, in the caſe of bail, being incapable of diviſion or diſmemberment, the mention of a *part* indefinitely is therefore equivalent to the mention of the *whole*. It is otherwiſe where a perſon ſays "I have become bail for the *hand*," (or "the *foot*,") becauſe neither of theſe parts are ever uſed to denote the whole of the perſon, and the bail ſo given is therefore invalid. under what

If a perſon ſay "I am reſponſible [*Zâmin*] for ſuch a perſon," it is a valid bail; becauſe this is an expreſs declaration of the intention of bail. It is alſo a valid bail, if a perſon ſay, "This is *upon* me," or, "This is *towards* me," becauſe both theſe expreſſions indicate an obligatory engagement.—In the ſame manner, alſo, bail is contracted by the words *Zeyim* and *Kâbeel*, for both of theſe ſignify bail, and hence it is that bail-bonds and other inſtruments of obligation are termed *Kabâla*. If, on the contrary, a perſon ſay, "I am reſponſible for the *notoriety* of a certain perſon," bail is not contracted, ſince the reſponſibility, in ſuch caſe, relates merely to the *notoriety* and not to the *claim*. Hence if a perſon ſhould ſay, in the Perſian language, "His acquaintance is upon me," he does not thereby become bail.—If, however, he ſhould ſay, "He is "my acquaintance," lawyers are of opinion that he becomes bail becauſe of ancient cuſtom.

The ſurety muſt deliver up the perſon for whom he is bail at the ſtipulated period; and in failure of this, is liable to impriſonment.

If, in a contract of bail, it be ſtipulated that "the ſurety ſhall, at "a fixed period, deliver over the principal or perſon bailed to the "claimant," it is in that caſe neceſſary that he be delivered to the claimant, if it be required, either at the fixed period, or at any time afterwards, in order that the ſurety may acquit himſelf of the engagement into which he has entered.—If, therefore, he deliver the perſon bailed on the demand of the claimant, he then becomes releaſed from his engagement; but if he refuſe to deliver him, the magiſtrate muſt in that caſe impriſon him for failure in the performance of his engagement. He is not, however, to be impriſoned on the *firſt* ſummons, as he may not then know for what reaſon the *Kâzee* had ſummoned him.

If the principal diſappear, the ſurety muſt be indulged with time to ſearch for him; and the contract is fulfilled by delivering up the principal at any place which admits of litigation.

If, in a caſe of bail for the perſon, the principal ſhould diſappear, it is in that caſe incumbent on the *Kâzee* to afford the ſurety a ſufficient period to go and come in ſearch of him; and afterwards to impriſon him, in caſe of his not producing the principal, becauſe he is then proved to have failed in his engagement.—If, however, he produce the principal, and deliver him to the claimant, in ſuch a place as may enable him to litigate his ſuit with him, the ſurety is then releaſed from his engagement of bail, becauſe of his performance of the obligation he had contracted; and the end of the contract is likewiſe anſwered, as it only requires that he deliver him *once*. If he ſhould have agreed to deliver him "in the aſſembly of the *Kâzee*," and afterwards deliver him in the market place, ſtill he is releaſed from his engagement, becauſe the object of the bail is anſwered. (Many have obſerved that in the preſent age the ſurety would not in ſuch caſe be releaſed from his obligation; becauſe, as the probability in this age is that the people would aid the defendant in preventing his appearance in the aſſembly of the *Kâzee*, and that they would not aſſiſt the claimant in enforcing it, ſuch a clauſe is therefore beneficial.) —If, however, the ſurety deliver over the principal in a *deſert*, he is not releaſed from his engagement, becauſe the claimant could not in ſuch place litigate his ſuit with him, and the object of bail remains therefore unaccompliſhed. In the ſame manner, he is not releaſed from his obligation in caſe he deliver him up in a village where there is no *Kázee*; becauſe, where there is no *Kázee*, the claimant can obtain no decree. If he ſhould deliver him up in another city than that in which he had entered into the contract of bail, he is then (according to *Haneefa*) exempted from any further obligation.—The two diſciples are of a different opinion, becauſe it may often happen that the witneſſes are in the city in which the contract was formed. —If, moreover, he deliver over the principal in the priſon, where he had been previouſly confined by another for a different cauſe, he is not releaſed from his engagement, becauſe the claimant has no power, in ſuch ſituation, to litigate his ſuit with him.

death of the principal releaſes the ſurety;

and the death of the ſurety annuls the contract.

If, in a caſe of bail for the perſon, the principal ſhould die, the ſurety is then releaſed from his engagement; *firſt*, becauſe of the impracticability of producing the perſon; and, *ſecondly*, becauſe, in the ſame manner as the appearance of the principal is by ſuch event defeated, ſo alſo is the enforcement of it on the part of the ſurety. The ſame rule alſo holds in caſe of the death of the ſurety; becauſe it then becomes impracticable for him to deliver up his principal; and, alſo, becauſe his property is not of an analogous nature, ſo as to admit a diſcharge of the obligation by means of it.—It is otherwiſe in the caſe of bail for *property*, for if the ſurety for property die, the obligation of bail does not then ceaſe, ſince it is neceſſary to diſcharge it by means of his property, to whatever amount he may have rendered himſelf liable.

If the *claimant*

If the claimant ſhould die, his executor (if there be any) or otherwiſe his heirs, are entitled to claim the fulfilment from the ſurety; becauſe heirs and executors repreſent the dead.

The ſurety is releaſed by delivering up his ſuretee ;

If, in a caſe of bail for the perſon, the ſurety ſhould not ſtipulate his releaſe from the bail on the delivery of the perſon, he is nevertheleſs releaſed on ſuch delivery, becauſe this being the intention of the contract, it is conſequently eſtabliſhed independant of an expreſs declaration. It is to be obſerved, likewiſe, that the ſurety becomes exempt from his obligation on the delivery of the perſon, without the acceptance of the claimant being required as a condition, in the ſame manner as in the payment of a debt. The effect is alſo the ſame, in caſe the principal ſhould of himſelf preſent his perſon, as if he ſhould ſay "I have preſented myſelf on account of the bail of a particular "perſon who has become ſurety for me." This is approved, becauſe the ſurety being entitled to contend with him, in order that he may deliver himſelf up, it is therefore permitted to him to deliver himſelf up voluntarily to prevent contention. It is alſo lawful for the agent or meſſenger of the ſurety to deliver the perſon, as theſe are the repreſentatives of the ſurety himſelf.

or, by deli- [illegible] *him-*

or, by his be- [illegible]

The payment [illegible] claim [illegible] ſuſpended upon the non-production of the [illegible]

If a perſon become bail for the appearance of another, on this condition, that, if he do not deliver him within a particular period, he ſhall then be reſponſible for the claim upon him, (a thouſand *dirms* for inſtance,) and he afterwards fail of producing him within the fixed pe- [illegible] he is then bound to make good the claim upon the ſuretee;—becauſe in this caſe a bail for *property* is ſuſpended on the condition, namely, the failure in producing the perſon within a fixed period; and ſuch ſuſpenſion is valid, becauſe of the cuſtom of mankind. Hence, when the condition is not fulfilled, the ſurety becomes reſponſible for the claim; and he is not, nevertheleſs, releaſed from the bail for the perſon; becauſe bail for the perſon and bail for the property are not incompatible.—*Shafeï* maintains that the bail in this inſtance is not valid; becauſe bail for property induces a reſponſibility for property in the

but ſtill the bail for the *perſon* remains in force.

the ſame manner as ſale; and hence it is unlawful to ſuſpend it on a matter of doubt and uncertainty; in the ſame manner as in the caſe of ſale.—The reaſoning of our doctors is that bail for property is ultimately like *ſale*, inaſmuch as it entitles the ſurety to repayment *from* the principal of what he advanced to the claimant on his account,—and that in the beginning it reſembles a gift, being an acquieſcence in reſponſibility without any exchange.—In due obſervance, therefore, of both theſe circumſtances, it is declared that the ſupenſion of it, on an uncertain condition, (ſuch as the blowing of the wind, the falling of the rain, and the like,) is invalid; but that it is valid if ſuſpended on a certain condition, ſuch as in the caſe in queſtion.

IF a perſon be bail for the appearance of another " on the mor-" row," under a condition of anſwering the claim upon the other himſelf, in caſe of failure, and the principal die before the morrow, he is in that caſe ſurety for the property, becauſe here the condition on which he agreed to the reſponſibility clearly takes place.

If the time be [illegible] the ir [illegible] the ſurety becomes reſponſible.

IF a perſon claim one hundred *deenars* from another, either with or without an explanation of their quality, and a third perſon become bail for the perſon of the debtor, under a condition that " if he do not de-" liver him on the morrow, he ſhall be reſponſible for an hundred " *deenars*," and he fail in the delivery of him on the next day, he is in that caſe reſponſible, according to *Haneefa* and *Aboo Yooſaf*, for the one hundred *deenars*.—*Mohammed* maintains that if the *quality* of the *deenars* be not explained previous to the acceptance of the bail, the claimant has no right afterwards to explain their quality and demand them from the ſurety.—His arguments in ſupport of this opinion are twofold. FIRST, the ſurety has reſted indefinite money upon a matter of doubt and uncertainty, inaſmuch as he has not ſpecifically referred the one hundred *deenars* to thoſe which were claimed; (for which reaſon the bail is invalid, even if a definition of the quality have been previouſly given.)—SECONDLY, the claim of an hundred *deenars*, without

Caſe of bail [illegible] with bail for the perſon.

without a definition of their quality, is invalid; whence no obligation lies on the ſurety to produce the debtor; and as, where the production of the debtor is not obligatory on the ſurety, the bail for the perſon is of conſequence invalid, it follows that the bail for the property is alſo invalid, ſince this reſts upon the other.—(From what is here advanced it appears that the bail in queſtion is valid if the *quality* of the *deenars* be ſpecified.)—The argument of the two elders is that the *deenars* mentioned by the ſurety do evidently, from the circumſtances of the caſe, relate to thoſe claimed.—It is, moreover, a frequent practice to keep a claim in a ſtate of doubt and uncertainty.—The claim in queſtion, therefore, is valid, in this way, that the claimant will (it is to be expected) explain the quality, and ſuch explanation will be applied to the original claim:—and upon the *claim* becoming valid, the *firſt* bail (namely bail for the perſon) becomes valid; and in conſequence thereof the *ſecond* bail (namely bail for the property) alſo becomes valid.

Bail for the perſon cannot be exacted in caſes of *puniſhment* or *retaliation*:

but may be fer- ac-

BAIL for the perſon is not lawful in caſes of puniſhment and retaliation, according to *Haneefa*;—that is, the *Kázee* has no power to exact it by compulſion.—If, however, the perſon upon whom puniſhment or retaliation is claimed, ſhould in a voluntary manner give bail of himſelf, it is admiſſible in the opinion of all our doctors; becauſe that which is the end of bail for the perſon is in this caſe alſo anſwered, ſince the production of the perſon of the accuſed is hereby ſecured.—It is to be obſerved that the perſon upon whom puniſhment or retaliation is claimed, muſt not be impriſoned until evidence be given, either by two people of unknown character, (that is, of whom it is not known whether they be juſt or unjuſt) or by one juſt man who is known to the *Kázee*; becauſe the impriſonment, in this caſe, is founded on ſuſpicion, and ſuſpicion cannot be confirmed but by the evidence of two men of unknown character, or of one juſt man. It is otherwiſe in impriſonment on account of *property*; becauſe the defendant, in that inſtance, cannot be impriſoned but upon the evidence of *two juſt men*; for impriſonment on ſuch an account is a grievous oppreſſion, and therefore requires to be grounded on complete proof.—In the *Mabſoot*, under the head of *duties of the Kâzee*, it is mentioned that, according to the two diſciples, the defendant, in a caſe of puniſhment for ſlander, or of retaliation, is not to be impriſoned on the evidence of *one* juſt man, becauſe, as the exaction of bail is in ſuch caſe (in their opinion) lawful, bail is therefore to be taken from him.

It is lawful to take a pledge or accept of bail for the payment of any fixed tribute, becauſe tribute being a debt of which the payment is demanded, it may be diſcharged by means of the pledge or the bail, and hence the objects of theſe contracts is anſwered.

A pledge or bail may be accepted for the payment of any fixed tribute.

If bail for the perſon be firſt taken from one, and afterwards from another, the bail in that caſe holds with reſpect to both; for the deſign of bail is to fix the obligation of a claim, and this may be extended to many, ſo as to render them ſeverally reſponſible. Beſides, as the object of bail is ſecurity, this is increaſed by the taking of bail from another; and hence there is no incongruity in the exiſtence of both at the ſame time.

All that has been here advanced relates to bail for the *perſon*.—With reſpect to bail for *property*, it is lawful, whether the extent of the property be known or uncertain, provided it be founded on a juſt debt,—that is, a debt which cannot be annulled but by payment or exemption: in oppoſition to a claim of *ranſom*, which is a debt due by a *Mokâtib* to his maſter,—becauſe that may poſſibly become null without payment or exemption, by an inability in the *Mokâtib* to diſcharge it. Property known in the extent is (for inſtance) where a perſon ſays to a claimant "I have become bail for a perſon who owes you a "thouſand new *dirms*." The nature of *uncertain* property may alſo be explained by an example; as for inſtance, where a perſon ſays "I have "become

Bail for property is lawful, if founded upon a *juſt debt*, the *known* or *certain*.

"become bail for the debt which a particular perſon owes to you;" or, "I have become bail in this ſale for whatever claim may hereafter be made on the ſubject of it,"—which bail is termed *Kafâlit-be'l-dirk*, or bail for accidents, that is, *for whatever may happen.* In ſhort, bail for certain or uncertain property is lawful, becauſe bail reſts upon a broad foundation, and a ſmall degree of uncertainty in it is therefore of no conſequence. Beſides, all our doctors are agreed in the legality of *Kafâlit-be'l-dirk*, or bail for *what may happen*; which is a convincing argument of the legality of bail for *uncertain* property. Moreover, bail is lawful in the caſe of unintentional *Shoodja* [a wound occaſioned by the throwing of a ſtone] although there be in it a great degree of uncertainty; becauſe it is poſſible that death may enſue, which induces retaliation; and it is alſo poſſible that a recovery may take place, in which caſe a *fine of property* only is required. Now if, notwithſtanding this degree of uncertainty, the bail be lawful, it follows that it is in the ſame manner lawful in the caſe of uncertain *property.*

In a caſe of
at
liberty to make his demand either

THE perſon to whom the bail is given is at liberty to demand payment either from his debtor, who is the principal, or from his ſurety, becauſe bail ſignifies a junction of perſonal reſponſibility to the perſonal reſponſibility of the debtor, in a claim; and this does not im- an exemption to the debtor from the claim; on the contrary, it marks the continuance of his reſponſibility;—unleſs ſuch exemption ſhould have been ſpecified as a condition in the contract of bail, in which caſe the contract of bail becomes a contract of transfer, in the ſame manner as a transfer becomes bail, if a condition of exemption to the debtor be not ſpecified; becauſe regard muſt be had to the *ſpirit* of the contract; and in the former inſtance the contract bears the ſenſe of a transfer, in the ſame manner as, in the latter, it bears the ſenſe of *bail.*

may call

IF the perſon to whom the bail is given call upon one of the two parties, upon *either* or *both*.

parties,—that is, upon either the debtor or the ſurety,—he is entitled alſo to call upon the other; and he may, if he pleaſe, call upon *both*.—It is otherwiſe where the proprietor demands compenſation for his property from one of two uſurpers,—(that is, from the original uſurper, or from another who has uſurped it again from him;) for he cannot then demand it from the other; becauſe upon his agreeing to accept compenſation for the uſurped property from *one* of them, he thereby conſtitutes him proprietor, ſince option of compenſation involves inveſtiture with right of property; and hence the impoſſibility of his afterwards conſtituting the other proprietor. A claim in virtue of *bail*, on the contrary, does not involve an inveſtiture with right of property.—There is therefore a difference between theſe caſes.

Bail may be ſuſpended upon any fit and proper condition.

THE ſuſpenſion of bail upon a condition is lawful.—Thus if a perſon ſay to another " If you ſell your goods to *Zeyd*, the price is " upon me,"—or, " If any thing be due to you from a certain per- " ſon, that is upon me,"—or, " if a certain article be uſurped from " you, the damage is upon me,"—in all theſe caſes the bail is lawful, becauſe all our doctors have agreed upon the legality of *Kafálit-be'l-dirk*, when ſuſpended on a condition.—It is to be obſerved, however, that although conditional bail be lawful, ſtill it is requiſite that the condition on which it is ſuſpended be of a nature adapted to the contract of bail,—either by reſting upon the obligation of a right, (as if the ſurety ſhould ſay, " If the ſubject of the ſale be not claimed by " another, I hold myſelf reſponſible for the price,")—or, by reſting upon the *poſſibility* of the exaction of a debt, (as if he were to ſay, " upon *Zeyd* [meaning the *principal*] arriving," &c.) or, by reſting upon the *impoſſibility* of the exaction of a debt, (as if he were to ſay, " upon ſuch a perſon [meaning the *principal*] diſappearing," &c.) for the ſuſpenſion upon a condition *not* of a fit nature,—(ſuch as, upon the falling of rain, or the blowing of wind,) is unlawful.—In the ſame manner alſo, it is unlawful to ſtipulate theſe events as the period for payment of debt;—as if a perſon ſhould ſay, " I have become bail for "the debt due to you by a certain perſon, *until the rain fall*, or *the* "*wind blow*," in which caſe the bail is valid, but the condition is invalid, and therefore an immediate payment of the money is required; becauſe the ſuſpenſion of bail on a condition is valid, and it does not become invalid from the invalidity of the condition, being ſimilar to the caſe of divorce and emancipation.

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ſurety.

If the ſurety ſay to the claimant "I am bail for the debt due to "you by a particular perſon," and it be afterwards proved, by witneſſes, that the debt amounts to one thouſand *dirms*, in that caſe the ſurety is anſwerable for that ſum, becauſe proof by *teſtimony* is equivalent to that by *actual ſight*. But if the amount of the debt ſhould not be proved by witneſſes, the averment of the ſurety is in that caſe to be credited in the amount which he may acknowledge; for, with reſpect to whatever ſum may be alleged beyond his own acknowledgment, he is conſidered as the *defendant*.—Hence if the principal acknowledge a greater amount than that acknowledged by the ſurety, it cannot be admitted to operate againſt him; becauſe, conſidered as an acknowledgment or declaration with regard to another, it is invalid, as an acknowledger has no power over another.—It muſt be credited, however, with relation to himſelf; for he has power over his own perſon.

Bail may be contracted *with* or *without* the conſent of the principal.

It is lawful to become bail either with or without the deſire of the principal; becauſe the tradition with reſpect to it is abſolute, and does not reſtrict it to the deſire of the principal. Bail, moreover, being an obligatory engagement, is a deed relative to the ſurety himſelf, in which there is an advantage to the claimant and no detriment to the principal: for if he ſhould have become bail *without* the deſire of the principal, then he has no right to apply to him for what he may pay on his account; or if, on the other hand, the bail was contracted by his deſire, then the principal has expreſſed his acquieſcence in his claim of repayment from him, to which he is entitled becauſe of his having made the payment in virtue of authority from him,—whereas he has no right to repayment in caſe of having become bail without the deſire of the principal, as the payment ſo made was a gratuitous deed.—It is to be obſerved that the ſurety has a right to a repayment, from the principal, of the ſum which he may have advanced on his account in virtue of the reſponſibility he contracted by his deſire.—As for inſtance, if the debt be one thouſand good *dirms*, and he pay the claimant one thouſand good *dirms*, he is then entitled to the repayment of one thouſand good *dirms*.—But if he ſhould make a payment of a nature different from his engagement,—as if, having become bail for one thouſand good *dirms*, he ſhould pay the claimant one thouſand *bad*, or *vice verſa*,—he is in that caſe intitled to receive from the principal the full amount for which, by his deſire, he had become reſponſible; becauſe the ſurety, from the payment of the debt, becomes proprietor of it, and ſtands therefore in the place of the creditor;—in the ſame manner as if he had become proprietor of it by virtue of a gift, or of inheritance;—(that is, as if the claimant had beſtowed on him a gift of the debt due to him by the principal, and permitted him to take poſſeſſion of it,—or, as if the ſurety had ſucceeded to the debt in right of heritage;—or, in the ſame manner as where the perſon to whom a debt has been transferred acquires a property in the debt by either of theſe modes.)—It is otherwiſe in the caſe of a perſon inſtructed to pay a debt; for if a perſon be deſired by another to pay a debt on his account, and pay it accordingly, he is in that caſe entitled to receive from the other the exact ſum he has paid on his account, although the debt relate to bad *dirms*, and he pay it in *good*; becauſe a perſon ſo inſtructed, having incurred no reſponſibility, has therefore no right to become proprietor of the debt in virtue of his having paid it.—It is otherwiſe, alſo, if a perſon, having become bail for a debt of one thouſand *dirms*, ſhould compound with the claimant for the payment of five hundred *dirms*;—for in this caſe he is intitled to receive only five hundred *dirms* from the debtor, becauſe compoſition is ſimilar to annulment of part of the debt, and the caſe is therefore the ſame as if the

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claimant had remitted part of the debt to the ſurety; and as, in caſe of remiſſion of the debt by the claimant, the ſurety has no right to receive any thing from the debtor,—it follows that, in the caſe of *compoſition* alſo, he has no right to receive more than he has actually paid.

He cannot claim reimburſement until he has actually diſcharged the claim upon the *principal*:

A SURETY has no right to advance any claim on the principal until he make payment on his account, becauſe he does not become proprietor of the debt until he pays it.—It is otherwiſe with reſpect to an *agent for purchaſe*; as he is entitled to receive from his conſtituent the price of the merchandize previous to the payment of it on his part. The reaſon of this is that there virtually ſubſiſts a contract of exchange between the conſtituent and his agent; becauſe the right of property is firſt eſtabliſhed in the agent, and afterwards ſhifts to the conſtituent;—and hence they ſtand to each other in the relation of buyer and ſeller;—whence it is permitted to the agent to detain the merchandize from his conſtituent until he receive the price from him.

but he may proceed as the claimant proceeds.

IF the claimant importune the ſurety in purſuit of his claim, then the ſurety may in the ſame manner importune the principal or ſuretee. If, alſo, the ſurety be impriſoned by the claimant, he is in the ſame manner entitled to impriſon the principal.

He is releaſed by a diſcharge to the principal; but the principal is not releaſed by an exemption to *him*;

IF the claimant remit the debt to the ſuretee, or receive payment of it from him, the ſurety is in that caſe releaſed from his engagement; becauſe the debt, in reality, is due by the ſuretee:—but if he exempt the *ſurety*, the ſuretee (or *principal*) does not thereby become exempted from his debt; becauſe the ſurety is merely a *dependant*; and, alſo, becauſe he is liable only to a *claim*, whereas the debt exiſts in the principal independent of ſuch claim.

or a *ſuſpenſion* of the claim.

IF the claimant allow the principal a reſpite from his claim, or ſuſpend his claim upon him to a more diſtant period, ſuch reſpite or ſuſpenſion of claim operates alſo in favour of the ſurety;—but if he grant a reſpite of his claim to the ſurety, it does not operate in favour of the principal;—becauſe reſpite or ſuſpenſion, as being a *temporary* remiſſion, is therefore analogous to an *abſolute* remiſſion.—It is otherwiſe where, the debt being immediately due, the creditor accepts bail for the payment at the period of a month afterwards; for this ſuſpenſion of his claim for a month operates alſo in favour of the principal, becauſe here the period of ſuſpenſion agreed upon is a circumſtance annexed to the debt, which, at the time of contracting the bail, was immediately due.

If a ſurety, in a debt of one thouſand *dirms*, compound with the creditor for a payment of five hundred *dirms*, in that caſe both the principal and the ſurety become exempted from their reſpective obligations for the remaining five hundred *dirms*;—becauſe the ſurety having referred the compoſition to the thouſand *dirms* due by the principal, the principal becomes thereby releaſed from his obligation by the payment of five hundred *dirms*; for compoſition is a cancelling of part of the debt;—and the releaſe of the debtor from his obligation occaſions the releaſe of the ſurety.—He is alſo in this caſe entitled to five hundred *dirms* from the ſurety, provided he entered into the bail with his conſent.—It were otherwiſe if the ſurety ſhould compound the debt for ſome thing of a different ſpecies, (as if, inſtead of the *dirms*, he ſhould agree to pay a particular number of *deenars*, or any article of merchandize;) for in ſuch caſe he is entitled to a full payment of the debt, ſince ſuch compoſition is in the nature of a contract of exchange, and the ſurety becomes proprietor of the debt in virtue of his having given a conſideration for it.

A ſurety, *compounding* the debt of the principal with the claimant, diſcharges both from any further demands;

and has a claim upon the ſurety for what he pays in compoſition.

If the ſurety compound with the creditor for an exemption from the obligation contracted by him in virtue of the bail, the principal is not thereby exempted, becauſe the ſaid compoſition is merely an exemption

A ſurety compounding for an exemption

the principal.

emption granted to the ſurety from a claim upon him.—Thus, ſtance, if the ſurety for one thouſand *dirms* compound with the creditor for one hundred *dirms*,—in other words, if the creditor agree that, on condition of his paying one hundred *dirms*, he will exempt him from the reſt of his obligation,—in that caſe he becomes exempted from reſponſibility; and, provided he had become bail by deſire of the principal, he is entitled to receive one hundred *dirms* from him, whilſt the creditor retains his claim on the principal for the remaining nine hundred *dirms*.

Caſes in which the principal depends upon the terms of charge.

If a claimant ſay to the ſurety, who had become bail by deſire of the principal, "You are enlarged from the claim towards me," in that caſe the ſurety is entitled to receive the amount in queſtion from the principal; becauſe, according to the rules of grammar, this ſentence, in which the prepoſition *from* with reſpect to the object, and that of *towards* with reſpect to the claimant of ſuch object, are uſed, means that the claim has been diſcharged.—Hence the claimant, in this caſe, is held to have made an acknowledgment of the diſcharge of the claim; and for this reaſon the ſurety is entitled to receive the payment of it from the principal.—But if he ſhould merely ſay "I have "enlarged you," the ſurety is not entitled to any thing from the principal; becauſe his enlargement, being here expreſſed without any mention made of its operation towards another, is conſidered as an *annulment*, and not as a *declaration of diſcharge*.—If he ſhould only ſay "you are enlarged," without adding, "towards me," in that caſe there is a diſagreement amongſt our doctors.—*Mohammed* alleges that it is ſimilar to the ſecond inſtance—"I have enlarged you." *Aboo Yooſaf*, on the other hand, is of opinion that it is ſimilar to the firſt inſtance,—"You are enlarged from the claim towards "me."—Some, again, have ſaid that, in all theſe caſes, if the claimant be preſent, it is requiſite to demand an explanation from him, ſince he has uſed a dubious expreſſion.

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The ſuſpenſion of enlargement from bail on a condition is not lawful; becauſe an enlargement of this kind, as well as that of other deſcriptions, involves an endowment with right of property, and the *ſuſpenſion* of an endowment with right of property is not lawful*.—There is a tradition that ſuch ſuſpenſion is lawful; becauſe, in fact, a ſurety is reſponſible for a *claim*, and not for a *debt*,—whence ſuch enlargement is, like divorce, a mere annulment †, and therefore cannot be undone by the rejection of the ſurety §:—and the enlargement from bail being a mere *annulment*, it follows that the ſuſpenſion of it upon a condition is lawful, in the ſame manner as the ſuſpenſion of *divorce* or *emancipation:* in oppoſition to the enlargement of the *principal*; as that is an endowment with right of property, and may therefore be rejected by him.

Bail, in of puniſhment

Bail is not valid with reſpect to any *right* of which the fulfilment is impracticable by means of bail, as in caſes of *puniſhment* or *retaliation*,—becauſe proxies are not admitted in caſe of corporal puniſhment. But bail for the *perſons* of criminals under the ſentence of ſuch puniſhments is lawful.

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* An endowment with a right of property (ſuch as a *gift*, for inſtance) muſt operate immediately, otherwiſe it is not valid.

† This doctrine is founded on the metaphyſical diſtinction which the *Muſſulmans* draw betwixt a debt and a claim. Thus where a perſon remits to another a debt contracted by *borrowing*, *purchaſe*, or the like, he, as it were, conveys or makes over ſo much property to that other:—but where he remits an obligatory claim upon another to anſwer the debt of a third perſon, he then merely annuls a right of his own; for as that other had not in reality received any property from him, he cannot by ſuch remiſſion be ſaid to have made over ſo much property to him.

§ A gift, or any deed veſting property in another, cannot operate without the conſent of that other. On this principle a gift is not held to take place until the ſeizin of the donee, as, until then, it is in his power to render it void by a rejection. But it is not in the power of the ſurety to prevent the operation of the exemption in his favour by the rejection of it, as it is held to be an annulment of a right on the part of the claimant, and not a deed conveying property to him.

Bail may be

A PERSON may lawfully become bail, on the part of a purchaſer, for the payment of the price, becauſe price is a debt: but it is not lawful to become bail, on the part of the ſeller, for the merchandize; for that is ſubſtance, of which the compenſation, in caſe of deſtruction, is inſured, by means of ſomething of a different kind, namely, the *price*; and although bail for inſured ſubſtance be lawful in the opinion of all our doctors, ſtill it is required that the ſubſtance be inſured for a ſimilar in kind, ſuch as the ſubject of an invalid ſale, an article ſeized in virtue of an intention to purchaſe, or an article uſurped; but not for any ſubſtance which is inſured for ſomething of a *different* kind, ſuch as the ſubject of a *valid* ſale, or a *pawn*; nor for any ſubſtance held in the nature of truſt, ſuch as a depoſit, a ſubject of rent, a loan, *Mozáribat* ſtock, or *partnerſhip* ſtock.—If, after the purchaſer, in a caſe of ſale, had paid the price, a perſon become bail for the delivery of the goods to him,—or if, in a caſe of pawnage, a perſon become bail for the pawnee's reſtitution of the pledge,—or, in a caſe of hire, for the renter's reſtoring the article hired,—in all theſe caſes the bail is valid, becauſe of the ſurety having engaged for the performance of what was due and incumbent.

Bail for the ſpecific animal is not valid.

IF a perſon hire a quadruped for the carriage of a burthen, and another be bail for the animal carrying the ſaid burthen, it is not valid, becauſe of the animal being the property of another.—This, however, proceeds on a ſuppoſition of the hire having related to a ſpecific animal;—for, if the animal be not ſpecific, the bail is valid, as in that caſe it is in the power of the ſurety to ſupply an animal of his own for the carriage of the burthen. In the ſame manner, in caſe of a perſon hiring a ſlave for ſervice, bail given for his performance of the ſervice is invalid, as the ſlave is not the property of the ſurety, and he has conſequently no power of enforcing what he has undertaken.

A contract of bail muſt be formed with

A CONTRACT of bail is not valid unleſs it be formed with the conſent of the claimant.—This is according to *Haneefa* and *Mohammed.*

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the conſent of the claimant,

—*Aboo Yooſaf* alleges that a contract of bail is valid, if, having been formed without the knowledge of the claimant, it receive his aſſent on its being notified to him: and (according to ſeveral copies of the *Mabſoot*) his aſſent is not a condition.—This diſagreement relates equally to bail for the *perſon*, and bail for *property*.—The reaſoning of *Aboo Yooſaf*, in ſupport of his opinion, is, that as bail ſignifies an obligatory engagement, it is therefore binding on the perſon who undertakes it; and hence it would appear that it does not depend on the aſſent of the claimant: but the reaſon for ſuſpending it upon his concurrence is the ſame as occurs under the head of *marriage*, treating of *Fazoolee* marriages; "The declaration of the ſurety that he has become bail for a particular thing, on the part of a particular perſon, "renders the contract complete; but as it is a deed affecting the "claimant, (inaſmuch as it inveſts him with a right to a claim,) it is "therefore ſuſpended upon his aſſent."—The reaſoning of the other two doctors is that bail creates a right; in other words, the ſurety conſtitutes the claimant proprietor of a claim upon him, which he accordingly demands from him after the completion of the contract.—Hence it follows that two points are neceſſary to the completion of the contract, namely, the ſpeech of the ſurety, (which is equivalent to a declaration with reſpect to the claimant,)—and the ſpeech of the claimant, (which is equivalent to acceptance.)—Now in the caſe in queſtion there exiſts only *one* of theſe two requiſites: the contract, therefore, is not ſuſpended beyond the meeting; and conſequently a contract of bail is not valid but through the conſent of the claimant at the meeting:—excepting only in one inſtance,—namely, where a ſick* perſon ſays to his heir, "be you bail for whatever debts I may "owe," and the heir becomes bail accordingly in the abſence of the creditors; for in this caſe the bail is effectual, notwithſtanding the abſence of the creditors, upon a favourable conſtruction,—for two reaſons; FIRST, the bail ſo contracted is, in effect, a *will*, and is therefore

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* Arab. *Mareez.*—Always meaning a perſon ſick of a *mortal* illneſs.

valid without the intervention of the claimant;—(and hence lawyers have remarked that this ſpecies of bail is not lawful unleſs when the ſick perſon is in poſſeſſion of property; becauſe a *will* would not otherwiſe be lawful;) SECONDLY, the ſick perſon is the repreſentative of his creditors, becauſe he ſtands in need of being ſo, in order that he may diveſt himſelf of his obligations; and alſo, becauſe this is attended with an advantage to the creditors.—The caſe is therefore the ſame as if creditors had themſelves been preſent.

OBJECTION.—If the ſick perſon repreſent his creditors, it follows that *his* acquieſcence is a neceſſary condition, in the ſame manner as that of the *creditors*, had they been preſent; and that the expreſſion of "Be you bail on my part for whatever I owe," is not concluſive of the contract;—whereas this renders it concluſive.

REPLY.—The bail founded on this ſpeech of the ſick perſon is valid, and his acquieſcence is not required as a condition; becauſe the meaning to be deduced from the ſpeech is, evidently, a *deſire* on the part of the ſick man that the bail be concluded, and not merely a *conſultation* reſpecting it; and his ſpeech therefore reſembles an order for the concluſion of a marriage, as already explained under the head of marriage.—(It is to be obſerved that if the ſpeech of the ſick perſon be addreſſed to a *ſtranger*, there is in that caſe a diſagreement with reſpect to the validity of the bail.)

Caſe of bail gratuitouſly entered into on behalf of an inſolvent defunct.

IF a debtor die without leaving any property, and another become bail to his creditors, ſuch bail is not valid, according to *Haneefa*.—The two diſciples allege that it is valid; becauſe it is undertaken on account of a debt, eſtabliſhed as the right of the creditors, and which is ſtill extant, ſince no perſon has diſcharged it, whence it ſtill exiſts ſo far as relates to the laws of futurity; that is to ſay, the debtor, if it be not diſcharged, becomes a criminal before God Almighty.—As, alſo, if the ſurety were actually to *diſcharge* the debt, ſuch diſcharge would be valid, being a gratuitous act of juſtice, in the ſame manner *bail* for it is conſequently valid.—The argument of *Haneefa* in ſupport of his opinion is, that the bail is in this caſe given for a debt which is annulled with relation to the laws of this world; and the validity of bail being founded on the laws of this world, it cannot be legally given for what no longer legally exiſts.

A debtor paying his ſurety the ſum for which bail has been given, before the ſurety has ſatisfied the creditor, cannot reclaim it.

IF a perſon, by deſire of another, ſhould become his bail for one thouſand *dirms* which he owes, and the debtor give the ſurety one thouſand *dirms* by way of *payment*, prior to his [the ſurety's] having paid the creditor, he [the debtor] is not in that caſe permitted to take from the ſurety the money he has advanced to him, for two reaſons. FIRST, the right of the poſſeſſor (namely, the ſurety) is connected with the one thouſand *dirms* on the probability of his having occaſion to pay them to the creditor, and therefore whilſt ſuch probability exiſts the principal ſurety has no right to take them from him; ſimilar to a caſe where a perſon haſtily (that is, before the ſtated time) pays *Zakât* to the collector, in which caſe he would not be entitled to take it back from him. SECONDLY, the ſurety becomes proprietor of the ſaid ſum in virtue of the ſeizin, on a principle which ſhall be preſently explained.—It is otherwiſe where the debtor gives the ſum to the ſurety by way of *commiſſion*; (as if he were to ſay to him, "Take this ſum "and deliver it to the debtor;") becauſe the ſurety does not become proprietor in virtue of ſuch a ſeizin: on the contrary, he is in ſuch caſe merely a *truſtee*.—It is to be obſerved that where the ſurety thus receives the thouſand *dirms*, and becomes proprietor in virtue of ſuch receipt, he is not required to devote in charity whatever profit he may acquire from it*; becauſe in this inſtance the property veſts in him immediately on the receipt. Where he receives it *after* having himſelf paid the debt, the reaſon of the property then veſting in him is evident; and where he receives it *before* he has paid the debt, he becomes proprietor immediately on the receipt.—The reaſon of this is, that the ſurety has a claim on the debtor for an article ſimilar to that for which the creditor has a claim upon him: but the claim of the ſurety upon the debtor is ſuſpended until he pay the debt to the creditor.—The claim of the ſurety, therefore, is in the nature of a debt to become due *hereafter*; (whence it is that if the ſurety ſhould, previous to his having diſcharged the debt to the creditor, *exempt* the debtor from the claim he had upon him, ſuch exemption would be valid.)—Now as an article ſimilar to that for which the ſurety is reſponſible to the creditor is due to him by the debtor, it follows that on his receiving payment from the debtor he becomes proprietor in virtue of ſuch receipt.—The degree of *baſeneſs*, moreover, which obtains in ſuch a tranſaction, (as ſhall be hereafter ſet forth) does not take effect, where a right of property exiſts, with reſpect to indefinite things; as has been already explained in treating of *invalid* ſales.

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* That is to ſay, whatever profit may ariſe from it between the period of his receiving it, and that of gratifying the claimant.

Caſe of a delivery of ſubſtance by the to ſurety againſt loſs.

IF bail be given for a *Koor* of wheat, and the principal deliver a *Koor* of wheat to the ſurety, and he ſell and acquire profit by the ſame, in that caſe the profit ſo acquired is, in the eye of the LAW, the right of the ſurety, on the principle already explained, of the property having veſted in him in virtue of the receipt.—The author of this work obſerves, that in his opinion it is moſt laudable that the ſurety give the ſaid profit to the debtor, although, in the eye of the law, this be not incumbent upon him: and ſuch (according to one paſſage in the *Jama Sagheer*) is the opinion of *Haneefa* upon this point.—The two diſciples maintain that as ſuch profit is the right of the ſurety, he ought not therefore to give it to the debtor:—and this alſo is related as an opinion of *Haneefa*, as well as another, namely, that the ſurety ought to beſtow it in *charity*.—The argument of the two diſciples is that the profit, as having reſulted from the property of the ſurety, becomes of conſequence his right.—*Haneefa*, on the other hand, argues that, notwithſtanding the exiſtence of the property, there is ſtill a degree

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of baſeneſs in it, becauſe it was in the power of the debtor to retake the *Koor* of wheat from the ſurety, and deliver it himſelf to the creditor; or, becauſe, in delivering it to the ſurety, it is probable that he did it with a view that he ſhould deliver it to the creditor. Now the baſeneſs here operates in conſequence of the thing to which it relates being *definite*; and the mode of purging ſuch baſeneſs is (according to one tradition) by devoting the profit in charity, or (according to another) by giving it to the debtor, as the baſeneſs is occaſioned by *his* right, and not by the right of the LAW.—This latter is the moſt authentic doctrine; but it preſcribes only a *laudable*, and not an *incumbent* duty; for the right of the ſurety is clear.

Caſe of bail diſcharged by an *aynit* ſale.

If a perſon become bail, by deſire of the principal, for a debt of one thouſand *dirms*, and the principal afterwards deſire him firſt to purchaſe on his account ſilks to the value of one thouſand five hundred *dirms*, in the manner of an *aynit*, and then to reſell the ſame, and diſcharge the debt by means of the price, and the ſurety act accordingly, the purchaſe ſo made is conſidered as on *his own* account, *not* on account of the principal, and he muſt, of conſequence, ſuſtain the loſs ariſing from the *aynit* ſale.—An *aynit ſale* is where a merchant, for inſtance, having been ſolicited by a perſon for a loan of money, refuſes the ſame, but offers to ſell goods to the other on credit at an advanced price; as if he ſhould charge fifteen *dirms* for what is worth only ten, and the other perſon agree to the ſame. This is termed an *aynit* or *ſubſtantial* ſale, becauſe it is a receſſion from a *loan* to a ſpecific *ſubſtance*; (in other words, the merchant declines granting the loan required of him by the borrower, but agrees, in lieu thereof, to ſell him the cloth, which is a ſpecific *ſubſtance*;)—and it is abominable, as being a receſſion from a loan of money, which is a laudable action, on a principle of avarice, which is a ſordid quality.—With reſpect to the nature of the caſe in queſtion, our doctors have diſagreed. —Some have aſſerted, that the direction given by the principal to the ſurety infers his [the principals] being reſponſible for any loſs that may be ſuſtained by the purchaſer in conſequence of the *aynit* ſale; and that his direction in this particular is not a commiſſion of agency; for this reaſon, that the order of the principal ("purchaſe ſilks *on* "*my* account,") implies this aſſumption of reſponſibility:—but a reſponſibility of this nature is invalid, ſince reſponſibility cannot hold except in an article in which the perſon who is reſponſible has ſome intereſt; and no perſon has any intereſt in the *loſs* on the preſent occaſion. Others again ſay, that the direction in queſtion amounts to a commiſſion of agency: but that it is an *invalid* commiſſion, as the ſilks to which it relates are not definite, neither is the *price* of them definite from an ignorance of how much it may exceed the amount of the debt.—The purchaſe of the ſilks is, in fact, conſidered as having been made on account of the ſurety, and the loſs reſulting from it falls entirely upon him, (*not* upon the principal,) ſince it was contracted by him.

Evidence cannot be heard in ſupport of any claim againſt a ſurety which does not come within the deſcription in the contract of bail.

If a perſon become bail on the part of another, for whatever may be proved to be due by him, or for whatever the *Kâzee* may decree againſt him, and the debtor afterwards diſappear, and a claimant offer to prove, by evidence, that the ſum due to him is one thouſand *dirms*, ſuch evidence is not to be admitted; becauſe here the bail is limited to whatever the *Kâzee* may decree, as is evident from the expreſſion "Whatever the *Kâzee* may decree," and likewiſe from that of "Whatever may be proved to be due by him," ſince nothing can be proved but by the decree of the *Kâzee*, and the claim in queſtion has not this limitation:—it is therefore invalid, and accordingly the evidence in ſupport of it cannot be heard.

A decree paſſed againſt a ſurety in the abſence of the principal cannot affect the latter unleſs the bail were

If a perſon prefer a claim before the *Kâzee* to this effect, "That "an abſentee owes him a thouſand *dirms*, and that a particular perſon preſent is, by deſire of the debtor, bail for the ſame," and eſtabliſh his aſſertion by teſtimony, in that caſe the *Kâzee* muſt paſs a decree againſt both the debtor and the ſurety.—If, however, the bail have been given *without* the deſire of the debtor, the *Kâzee* muſt in that caſe decree the debt ſolely againſt the ſurety; and in this inſtance the evidence adduced by the claimant is admitted as ſufficient, becauſe the bail is *abſolute*, and not *qualified*, as in the preceding caſe.—It is to be obſerved that the different decrees which the *Kâzee* gives in the caſe of bail *with*, and *without*, the deſire of the debtor, (that is, the decree againſt *both*, in the one caſe, and againſt the *ſurety* only in the other,) is founded on the difference which obtains in the nature of theſe two modes of bail;—for bail by deſire of the debtor is a gratuitous deed in the origin, and a contract of exchange in the end; but bail *without* the deſire of the debtor is a gratuitous deed both in its origin and its conſequences.—Now where the claim relates to *one* only, the decree cannot be extended to the other. But if a decree ſhould be paſſed relative to a ſurety by deſire, it muſt neceſſarily include the principal, ſince the deſire he expreſſed is a virtual acknowledgment of the exiſtence of the debt.—It is otherwiſe with reſpect to a voluntary ſurety; for as the exiſtence of the debt in that caſe is proved by his belief of it, in having undertaken the bail with regard to it, and not by any virtual acknowledgment of the debtor, the decree is therefore ſolely referred to him.—In the *former* caſe, (namely, that of bail *by deſire*,) the ſurety is authorized to receive from the ſeller what he may have been obliged to pay on his account.—*Ziffer* maintains that he is not entitled to ſuch compenſation; becauſe, having himſelf refuſed to pay, and having been compelled to it, he is of conſequence in his own opinion oppreſſed; and it is not permitted to ſuch as are oppreſſed to oppreſs others.—Our doctors, on the other hand, argue that whenever a refuſal is undone by law, the opinion founded upon it becomes of conſequence null.

entered into by his deſire.

IF a perſon ſell a houſe, and another become *Kafeel-be'l-dirk*, or *ſecurity againſt accident* *, on his behalf, the ſecurity ſo given is a direct

(*be'l-*

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* *Dirk*, ſignifies, properly, *any poſſible contingency*. *Kafeel-be'l-dirk*, therefore, means *bail for what may happen*.—In the preſent inſtance it alludes to the poſſibility of a claim being afterwards ſet up to the houſe by ſome other perſon, which, if ſubſtantiated, would annul the ſale.

declaration of the houſe being the property of the ſeller.—If, therefore, the ſurety ſhould afterwards prefer a claim of right to the houſe, ſuch claim is inadmiſſible.—The reaſon of this is, that if the ſecurity be a condition of the ſale, (as if the purchaſer ſhould have ſaid, "I "will buy the ſaid houſe, provided a particular perſon will be ſecu-"rity againſt any future claim to it,") in that caſe the completion of the ſale reſts upon the agreement of the ſurety; and afterwards, when he prefers a claim of right to the houſe, he endeavours to deſtroy that which he had himſelf rendered complete:—if, on the other hand, the ſecurity ſhould *not* be a condition of the ſale, the ſurety, in that caſe, by agreeing to the bail, did, as it were, incite the buyer to the bargain, (ſince his deſire of purchaſe was founded on the procurement of bail.)—The bail ſo given, therefore, is equivalent to a declaration of the right of property of the ſeller.

An atteſtation to a contract [illegible] is not ivalent to [illegible]

IF, in the ſale of a houſe, a perſon ſhould atteſt the bill of ſale, and put his ſeal to it, without giving any ſecurity, ſuch teſtimony and affixture of ſeal is not an acknowledgment of the ſeller's right of property, and hence the witneſs may, if he pleaſe, afterwards claim the houſe, becauſe atteſtation is neither a condition of ſale, nor a declaration of the property of the ſeller, as it ſometimes happens that men ſell their *own* property, and ſometimes that of *others*.—Beſides, the witneſs may have made this atteſtation merely as a memorandum of the tranſaction; a ſuppoſition which the caſe of *bail* could not admit of.—Lawyers have remarked that if it be expreſſed, in the bill of ſale, that "a certain perſon had ſold ſuch a houſe, *which is his property*, "*by a complete and valid ſale*," and the perſon atteſt the writing to this effect, "Witneſs thereto," this is an acknowledgment and declaration of the ſeller's right of property.—If, on the other hand, he atteſt it thus, "Witneſs to the agreement of the buyer and ſeller," this is *not* a declaration of the ſeller's right of property.

SECTION.

SECTION.

Of ZAMINS, *or* GUARANTEES.

The guarantee of agents to their employers is *null.*

IF an agent ſell the cloths of his conſtituent, and hold himſelf reſponſible for the payment of the price to his conſtituent,—or, if a *Mozârib* ſell the goods of his employer and hold himſelf reſponſible for the payment of the price,—the reſponſibility in either caſe is null: FIRST, becauſe ſurety or bail is an engagement compelling the undertaker to anſwer a claim; and as, in theſe caſes, the agent and *Mozârib* are themſelves the claimants for the price of the goods, it follows that if they were reſponſible for the ſame, they would be *ſecurity on their own behalf*, which is abſurd:—and, SECONDLY, becauſe the goods remain in their hands in the nature of a truſt; and truſtees are not held by the LAW to be liable to reſponſibility.—If, therefore, they were held reſponſible, it would be contrary to the precepts of the LAW.—Hence the taking of ſecurity from them is null, in the ſame manner as a condition of reſponſibility is null with reſpect to a truſtee or a borrower.

The guarantee of partners, in a purchaſe and ſale to each other, is *null.*

IF two ſharers in a ſlave ſell him by one contract, and each of them be ſecurity to the other, on behalf of the buyer, for his payment of the proportion of the price due to that other, ſuch ſecurity is null; becauſe if the ſecurity were valid under a general copartnerſhip in the price, it neceſſarily follows that each is in part ſecurity on behalf of *himſelf*, ſince every member of the ſlave is indefinitely ſhared between them;—or if, on the other hand, the ſecurity of each were valid with reſpect to the other's ſhare in particular, this induces a diviſion of a debt before the receipt of it, which is unlawful.—It is otherwiſe where two partners in a ſlave ſell their ſhares by *different* contracts; as their ſecurity to each other, for the prices reſpectively due, is valid, ſince there is no *partnerſhip* in this inſtance, becauſe whatever is owing to each, reſpectively, in virtue of his particular contract, appertains ſolely to him, without any participation of the other;—whence it is that the purchaſer is at liberty to accept the ſhare of *one* of them only and to take poſſeſſion of it, after the payment of the price; and alſo that he may take poſſeſſion of the ſhare of one of them only after paying to him his proportion, notwithſtanding he may have purchaſed both ſhares.

Guarantee for land-tax, and all other regular or juſtifiable imposts, is *valid*.

If a perſon become ſecurity in behalf of another for tribute due by him, or for a *nawàyeeb* levied upon him, or for his *kiſſmát*, all ſuch ſecurities are valid.—Security for *tribute* is valid, becauſe tribute is in the nature of a debt, and may be a lawful ſubject of claim, as has been already explained: (in oppoſition to *Zakât*, as that is a matter ſolely affecting him who pays it, in the manner of a *gift*, and of which *his* property alone can be the ſubject;—whence, after his death, it cannot be diſcharged out of his effects, unleſs preſcribed in his will:)—and with reſpect to *nawàyeeb*, if it extend only to what is juſt, (ſuch as exactions for digging a canal, for the wages of ſafe guards, for the equipment of an army to fight againſt the Infidels, for the releaſe of *Muſſulman* captives, or for the digging of a ditch, the mending of a fort, or the conſtruction of a bridge,) the ſecurity is lawful in the opinion of the whole of our doctors.—But if *nawàyeeb* extend to exactions wrongfully impoſed, that is, to ſuch as *tyrants* extort from their ſubjects, (as in the preſent age,) in that caſe, concerning the validity of ſecurity for it, there is a difference of opinion amongſt our modern doctors.—*Sheikh Imâm Alee* is of the number of thoſe who hold the ſecurity in this inſtance to be valid.—With reſpect to *kiſſmát*, there is a difference of opinion concerning the meaning of the word.—Some allege that it ſignifies the ſame with *nawàyeeb*; whilſt others define it

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[*] *Nawàyeeb* are all extraordinary aids beyond the eſtabliſhed contributions, levied at the diſcretion of government to anſwer any particular emergency of the ſtate.

it to be the ſame with *Mowzifa Ràtiba*, that is, fixed impoſts which are exacted at ſtated periods, ſuch as once in the month, or once in every two or three months.—Now *nawàyeeb* means the caſual exactions made by the ſovereign, which have no fixed or ſtated period. The law, however, is as above explained, with reſpect to both. If, therefore, the exaction be right, then the ſecurity for it is lawful, according to all our doctors; or if wrong, there is a diſagreement with reſpect to the validity of the ſecurity.

Difference [illegible] *debt* and ſuſpended *bail.*

IF a perſon ſay to another, "I owe you a debt of one hundred "*dirms*, payable a month hence," and the other aſſert that the debt is immediately due, his aſſertion, as claimant, is to be credited.—But if a perſon ſhould declare to another, "I am ſecurity to you, in be-"half of another, for a debt of one hundred *dirms* payable a month "hence," and the other aſſert that the debt is due immediately, the declaration of the ſurety is to be credited.—The difference between theſe two caſes is, that in the *former* caſe the debtor makes an acknowledgment of the debt, and then claims his right to a ſuſpenſion of payment for one month; whereas in the *latter* caſe the ſurety makes no acknowledgment of the *debt*, inaſmuch as the obligation of the debt does not reſt upon the bail or ſurety, as has been often before explained.—In fact, he has ſimply acknowledged a *claim*, to which he is reſponſible *after the lapſe of a month*, which the claimant denies, aſſerting that he is anſwerable for ſuch claim *immediately*;—and regard is paid, in LAW, to the affirmation of the defendant.—A clauſe of *ſuſpenſion*, moreover, is merely an accidental property of a debt, and not an eſſential, whence it is that it cannot be proved unleſs it have been expreſsly ſtipulated.—The affirmation, therefore, of the perſon who denies the ſtipulation of ſuch condition is creditable,—in the ſame manner as in the caſe of a condition of option, in ſale.—*Bail under a ſuſpenſion*, on the contrary, is one ſpecies of bail, in which the being *ſuſpended* in its operation is an inherent quality, and not an accident; whence this ſpecies of ſuſpenſion may be proved without having been ſtipulated; as where, for inſtance, the debt due by the principal is a ſuſpended debt. According to *Shafeï*, the affirmation of the *claimant* is to be credited in either caſe; and the ſame is related as an opinion of *Aboo Yooſaf.*

Bail againſt accident, in the ſale of a ſlave.

If a perſon purchaſe a female ſlave, and another warrant her to be the property of the ſeller*, and ſhe afterwards prove to be the property of ſome *other* perſon, the purchaſer is not entitled to exact the price from the ſurety, until the *Kâzee* ſhall have firſt paſſed a decree againſt the ſeller for the reſtitution of the price;—becauſe, according to the *Zâhir Rawâyet*, the ſale does not become null immediately on the proof of the ſubject of it being the property of another, but endures until the *Kâzee* paſs a decree in favour of the purchaſer, directing the ſeller to return the price. Since, therefore, previous to the iſſuing the ſaid decree, it is not incumbent on the principal (that is, the ſeller) to make reſtitution of the purchaſe money, ſo neither is it incumbent on the ſurety. It would be otherwiſe if the ſlave were proved to be *free*, and the *Kâzee* paſs a decree to that effect, for in ſuch caſe the ſale becomes null immediately on the iſſuing of ſuch decree, ſince freedom is incapable of being the ſubject of ſale, and the buyer would, therefore, be entitled to exact the purchaſe-money either from the ſurety or from the ſeller, without waiting for a decree of reſtitution from the *Kâzee*.—It is related as an opinion of *Aboo Yooſaf*, that ſale becomes null immediately on the proof of the ſubject of it being the property of another; and that, conſequently, the buyer has in ſuch caſe a right to exact the price either from the ſurety or the ſeller, without waiting for the decree of the *Kâzee* to that effect.

Security for *fulfilment* is null.

If a perſon purchaſe a ſlave, and another be ſecurity for the fulfilment of the bargain†, ſuch ſecurity is null; becauſe the word *Obda*,

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* Literally, "*and another be bail againſt accident.*"

† Arab. *Zâmin ba Obda.*

[fulfilment] is of a comprehenſive nature, as having a variety of meanings. I. It relates to the former bill of ſale, which the ſeller received from the perſon who ſold the ſlave to him; and this being the property of the ſeller, any ſecurity with reſpect to it is invalid. II. It relates to the contract and its rights. III. It relates to a warrant or ſecurity againſt accidents. And, IV. To option.—As, therefore, the term comprizes ſo many things, the particular application of it is dubious; and hence practice cannot take place upon it.—It is different with reſpect to the term *dirk*, for although that ſignify *whatever may happen*, yet the cuſtom of mankind has reſtrained the application of it to one particular ſenſe, namely, a *ſecurity againſt any future claim*; and *Zimân-be'l-dirk*, or ſecurity againſt accident, is therefore valid.

Security for a
[illegible]
the purchaſer
is invalid.

If a perſon ſell an article, and another be ſecurity to the purchaſer for the releaſe[*] of that article, ſuch ſecurity is invalid, according to *Haneefa*, as the intention of it is the releaſe of the article, and the delivery of it to the purchaſer, which the ſecurity is not competent to perform.—The two diſciples hold this to be valid, as in their opinion it is equivalent to a ſecurity againſt accident;—in other words, it imports an obligation to deliver to the purchaſer either the article ſold, the value, or the price;—and ſuch being the caſe, it is valid of courſe.

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[*] Arab. *Khilâs:* meaning, the *ſurrender* of the article, by the ſeller, to the purchaſer.

CHAP.

CHAP. II.

Of Bail in which two are concerned.

Caſe of two perſons who are joint principals in a debt, and bail for each other.

If two men owe a debt in an equal degree, and each be ſecurity on behalf of the other,—as where, for inſtance, two perſons purchaſe a ſlave, jointly, and each is ſecurity on behalf of the other,—in this caſe, if either of them pay off a part, he has no right to make any claim on the other:—unleſs, however, the payment ſo made exceed a half of the whole debt, in which caſe he has a right to exact ſuch exceſs from the other.—The reaſon of this is, that each of them is a principal with reſpect to one half of the debt, and a ſecurity with reſpect to the other half;—for what each owes in virtue of his being a principal is no bar to the obligation upon him as a ſecurity, the one being founded on debt, and the other on a claim, which is ſubordinate thereto.—Whatever payments, therefore, either of them may make are held to be in virtue of the former, namely, the debt, as far as that extends; and any exceſs is referred to the latter, namely, the ſecurity.

Caſe of two perſons who are bail for a third, to the amount of the whole claim, and alſo, reciprocally, bail for each other's ſecurity.

If two perſons be *bail for property* in behalf of another,—in this way, that each ſurety, reſpectively, holds himſelf reſponſible for the other ſurety,—in this caſe, whatever either ſurety may pay, [in virtue of the bail,] whether the ſum be great or ſmall, he is entitled to exact the half of it from the other ſurety.—This proceeds upon a ſuppoſition that each of theſe two ſureties, reſpectively, is bail for the whole property on the part of the principal, and likewiſe for the whole obligation on the part of his co-ſurety. Hence in each of the two ſureties two bails are united; one on behalf of the principal, and one on behalf of the co-ſurety; and bail on behalf of a *ſurety* is lawful, in the ſame manner as on behalf of a *principal*, or as a transfer on behalf of a transferee; becauſe the intention of a contract of bail is *undertaking the obligation of a* CLAIM; and this end is anſwered by bail on behalf of a ſurety.—As, therefore, two bails are in this caſe united in each of the ſureties, it follows that whatever payments are made by either of them are made, in an indefinite manner, on account of both; for the payment ſo made was purely in virtue of the bail; and each, with reſpect to the bail, ſtands in the ſame predicament; that is to ſay, neither has a ſuperiority over the other.—(It is otherwiſe where each ſurety is a *principal* with reſpect to part of the debt, as in the *firſt* example; for in this caſe neither has a right to exact any thing from the other on account of the payments he may make, unleſs ſuch payments exceed the ſum for which he is a principal, becauſe the principal has a ſuperiority.)—Now ſince, in the caſe in queſtion, whatever payments either of the two may make are made indefinitely, on account of both, it follows that the perſon making ſuch payments is intitled to exact the half of them from the other. And this induces no unneceſſary revolution, becauſe the intention of the contract, in the preſent inſtance, is that the parties be on a footing of perfect equality with reſpect to the bail, which can only be anſwered by the one party taking from the other the half of what he may have paid.—The other, therefore, is not entitled to retake it again from the perſon who has firſt paid, becauſe this, if permitted, would deſtroy the equality already eſtabliſhed.—(It is otherwiſe in the *preceding* caſe, for there each of the parties is a principal with reſpect to a portion of the debt, and conſequently they are not on a footing of perfect equality with reſpect to the bail.)—When, however, one of the parties ſhall have taken the half from the other, then they are jointly entitled to exact the whole of what has been paid from the principal; ſince they paid the ſame on his behalf; the one making the payment immediately from himſelf, and the other doing it, as it were, by his ſubſtitute:—or the ſurety who paid is at liberty, if he pleaſe, to exact the whole of what he paid from the principal, becauſe he was bail for the whole of the property by his deſire.—If, in this inſtance, the creditor *exempt* one of the two ſureties, he has a right to claim the whole from the other, becauſe the exemption of a ſurety does not operate as an exemption in favour of the principal, and therefore the whole of the debt remains due by the latter; and the remaining ſurety being ſtill bail for the *whole* of the property, it is conſequently lawful to claim the whole from him.

In the diſſo-
e-
t-
p, each
partner is re-
ſponſible for
any debts
contracted

If two partners by reciprocity diſſolve their copartnerſhip, and ſeparate, whilſt ſome of their debts ſtill remain due, the creditors have in that caſe a right to claim the whole from whichever of them they pleaſe; becauſe each of theſe partners is ſurety for the other, as has been already explained in treating of partnerſhip.—Neither of the partners, moreover, has a right to make any claim upon the other for whatever payment he may have made to the creditors, unleſs ſuch payment exceed the half of the debt, in which caſe he has a right to exact from him the payment of ſuch exceſs, for the reaſon already explained, in diſcuſſing the caſe of reciprocal bail by two.

Caſe of two

behalf, for
their ranſom.

If a maſter conſtitute two of his ſlaves *Mokâtibs*, by one con- for a thouſand *dirms*, (for inſtance) and each of them become bail for the other, in that caſe, whatever ſum, from the whole amount covenanted to be paid by the maſter, is diſcharged by either, the half of that ſum may be exacted from the other.—Analogy would ſuggeſt that the bail, in this inſtance, is not valid; becauſe bail is valid only when oppoſed to a valid debt: and the conſideration of *Kitâbat*, or the degree of freedom beſtowed upon a *Mokâtib*, is not a valid debt, as has been already explained.—It is lawful, however, upon a favourable conſtruction, by conſidering each of the ſlaves as a principal with reſpect to the obligation of the whole conſideration of *Kitâbat*, namely, a thouſand *dirms*;—in other words, by conſidering each of them, reſpectively, as being reſponſible to the maſter for the payment of the whole; and, conſequently, that upon his making payment of the whole, the other obtains his freedom as a dependant,—in this way, that the freedom of both is ſuſpended on their payment of one thouſand *dirms*, and the maſter is at liberty to claim the ſaid thouſand from each of them, reſpectively, as a *principal*, not as a *ſurety*. Each, however, is conſidered as ſurety on behalf of the other, with reſpect to exacting a moiety of what he pays on account of the conſideration of *Kitâbat*.—(A particular explanation of this will hereafter be given in treating of *Mokâtibs*.)—From the explanation of the law in this caſe it appears that both ſlaves are equal with reſpect to the payment of the thouſand *dirms*, which is the conſideration of their *Kitâbat*; and hence each is reſpectively entitled to take from the other a moiety of whatever part of the ſaid thouſand *dirms* he may pay.—If the maſter, in this caſe, ſhould emancipate one of the ſlaves prior to his having made any payment on account of his *Kitâbat*, in that caſe he becomes free; becauſe his maſter, whoſe property he then was, choſe to emancipate him.—He becomes likewiſe exempted from any obligation to pay his half of the conſideration of *Kitâbat*, becauſe he acquieſced in that obligation merely as a means to obtain his freedom; but upon his becoming free in conſequence of the emancipation of his maſter it exiſts no longer as a mean, and therefore ceaſes altogether.—The obligation, however, for the payment of an half, ſtill continues incumbent upon the *other*, who remains a ſlave; becauſe the whole amount of the conſideration was oppoſed to the bondage of both; and the whole was conſidered as due from each, reſpectively, merely as a device, in order to render the bail of each in behalf of the other valid, and thereby to enable each to take from the other a moiety of what he pays.—But when the maſter emancipates *one* of them, there exiſts no further neceſſity for this device; whence the debt is then conſidered as oppoſed to them both, *jointly*, (not, *in toto*, to each reſpectively,) and is accordingly divided into two ſeparate parts, of which one ſtill continues due from him who remains a ſlave.—In taking this portion, the maſter is at liberty either to exact it from the *freedman*, in virtue of his being *ſecurity*, or from the *ſlave*, becauſe of his being the *principal.*—If he take it from the freedman, the freedman is then entitled to retake it from the ſlave, becauſe of his having paid it by his deſire: but if he take it from the ſlave, he [the ſlave] is not entitled to take any thing from the freedman, becauſe he merely pays a debt which he juſtly owes.

CHAP. III.

Of Bail by *Freemen* in behalf of *Slaves*, and by *Slaves* in behalf of *Freemen*.

A perſon becoming ſurety on behalf of a ſlave for a claim, to which the ſlave is not liable until after emancipation, muſt diſcharge it immediately.

If a perſon be ſurety in behalf of a ſlave, for ſome thing not claimable from the ſlave until after he recover his freedom, without ſpecifying whether the thing in queſtion is claimable immediately, or hereafter, in that caſe it is to be conſidered as immediately due;—that is to ſay, it is claimable immediately from the ſurety.—For inſtance, if an inhibited ſlave acknowledge his deſtruction of the property of any perſon,—or that he owes a debt which his maſter diſavows,—or if, having married without the conſent of his maſter, he ſhould have had carnal connexion with the woman on the ſuppoſition of ſuch marriage being valid, (in all which caſes nothing could be exacted from the ſlave *immediately*, nor until he become *free*,) and a perſon be a ſurety for the compenſation eventually claimable from the ſlave, he is liable to an *immediate* claim for it. The reaſon of this is, that the ſlave ought immediately to diſcharge the compenſation, becauſe there exiſts an evident cauſe of its obligation upon him, and a ſlave, in virtue of his being a MAN, is capable of being ſubject to obligation. He is, however, exempted from an *immediate* claim for the compenſation, becauſe of his poverty, ſince every thing he poſſeſſes is the property of his maſter, and his maſter is not aſſenting to the obligation. The ſurety, on the contrary, is not poor, and is therefore liable to the claim *immediately*, in the ſame manner as a perſon who becomes ſurety for an *abſentee* or a *pauper*.—It is otherwiſe where a perſon becomes bail for a *debt* not immediately due, for there the *ſurety* alſo is not liable to an immediate claim, any more than the debtor, ſince the debt is ſuſpended in its obligation to a future period by the conſent of the creditor.—It is, however, to be obſerved that, in the caſe in queſtion, the ſurety, on diſcharging the claim upon the ſlave, is not entitled to demand it from the ſlave until he ſhall have obtained his freedom; becauſe the creditor had no right to demand it until that event; and the ſurety ſtands in the place of the creditor.

Bail for the *perſon* of a ſlave is cancelled by his death.

IF a perſon advance a claim on an unprivileged ſlave, and another become ſurety for his perſon, and the ſlave afterwards die, the ſurety is in that caſe releaſed from his engagement, becauſe of the *principal* being releaſed.—(The law is the ſame where the ſlave, in whoſe behalf bail for the perſon is given, is *emancipated*.)

Bail to a claim of right in a ſlave ſubjects in the event of the ſlave's

IF a perſon claim the right of property in a ſlave, and another become ſurety in behalf of the poſſeſſor of him, and the ſlave then die, and the claimant eſtabliſh his right by witneſſes, the ſurety is in that caſe reſponſible for the price;—becauſe it was incumbent on the poſſeſſor to repel the claim, or, if he failed in ſo doing, to give the value for which the ſurety became anſwerable; and as the obligation, after the ſlave's death, reſts upon the principal, ſo alſo it now reſts upon the ſurety.—It is otherwiſe in the *preceding* caſe; for there the obligation was merely to produce the *perſon* of the ſlave, which is cancelled by his death.

Bail by a ſlave in behalf of his

behalf of his ſlave, does not afford any ground of claim by the ſurety upon the principal.

If a ſlave, who is not in debt, be ſurety for property in behalf of his maſter, or any other man, and be afterwads made free, and then pay amount for which he was ſurety,—or, if a maſter become ſurety for property in behalf of his ſlave, whether he be indebted or not, and after emancipating him, pay the amount for which he ſtood ſecurity, in neither of theſe caſes is either of the parties entitled to take any thing from the other.—*Ziffer* maintains that in both theſe caſes the parties have a right to recur to each other; that is, each is entitled to take from the other what he may have paid.—(It is here proper to remark that the reaſon for reſtricting the ſlave, in the firſt caſe, to one that is *free from* debt is, that if he were otherwiſe, he could not be ſurety for property in behalf of his maſter, ſince this would affect the right of his creditors.—The argument of *Ziffer* is that a ground of claim, (namely, bail by deſire of the principal,) exiſts in both caſes; and the bar to its operation (namely, *ſlavery*) is removed and done away.—The argument of our doctors is that the bail in theſe caſes is not in the beginning a ground of claim, ſince neither can the maſter have a debt due to him by his ſlave, nor can the ſlave have a claim of debt upon his maſter.—Hence as no ground of claim exiſted in the beginning, it does not afterwards take place, in conſequence of the removal of the bar to it, (namely, ſlavery;) for the law here is the ſame as where a perſon becomes ſurety for another without his deſire, in which caſe the ſubſequent aſſent of the ſurety is of no effect.

of

Bail for the conſideration of *Kitâbat*, whether the ſurety be a ſlave or a freeman, is not valid; becauſe the conſideration of *Kitâbat* is allowed to exiſt as an obligation merely from neceſſity, it being repugnant to reaſon, inaſmuch as a maſter cannot have a claim of debt upon his ſlave; and in the caſe in queſtion the *Mokâtib*, or perſon who owes the conſideration of *Kitâbat*, is ſuppoſed the ſlave of the claimant.—Hence the conſideration of *Kitâbat* is not ſo fully eſtabliſhed as to admit of bail for it,—becauſe wherever a thing is eſtabliſhed from neceſſity,

ceſſity, it is reſtricted entirely to the point of neceſſity. Beſides, the debt of *Kitâbat* ceaſes entirely in caſe of the inability of the ſlave to diſcharge it; nor is it poſſible to revive it, by claiming it from the ſurety, becauſe the meaning of bail is "*the junction of one perſon to* "*another perſon in relation to a claim.*—As, therefore, the claim does not operate upon the principal, it of conſequence ceaſes with regard to the ſurety; becauſe it is a rule that a principal and his ſurety are both equally liable for the ſame claim.

nor a conſi-

A CONSIDERATION, in lieu of emancipatory labour, reſembles the conſideration of *Kitâbat*, in the opinion of *Haneefa*, becauſe, (according to him,) a ſlave that works out his freedom by labour is in the ſame predicament with a *Mokâtib*.

HEDÂYA.

HEDÀYA.

BOOK XIX.

Of *HAWÀLIT*, or the *TRANSFER* of *DEBTS.*

nition of terms.

HAWÀLIT, in its literal ſenſe, means a *removal*; and is derived from *Tahool*, which imports the removal of a thing from one place to another.—In the language of the LAW it ſignifies the removal or transfer of a debt, by way of ſecurity and corroboration, from the faith of the original debtor, to that of the perſon on whom it is transferred. The debtor or perſon who transfers the debt is termed *Moheel:* the transferee, or perſon upon whom the debt is transferred, *Mohtal-ali hee*, and the creditor, or transfer receiver, *Mohtâl.*

The transfer of a debt

THE transfer of a debt is lawful; becauſe the prophet has ſaid, “ *Whenever a perſon transfers his debt upon a rich man, and the* “ *creditor aſſents to the ſame, then let the claim be made upon the* “ *rich man*;” and alſo, becauſe the perſon upon whom the debt is transferred undertakes a thing which he is capable of performing; whence it is valid, in the ſame manner as bail.—It is to be obſerved, however, that transfer is reſtricted to debt; becauſe it means an *ideal* removal; and an *ideal* removal, in LAW, applies to *debt*, and not to *ſubſtance*, which requires a *ſenſible* removal.

is rendered valid by the conſent of the creditor and transferee.

A CONTRACT of transfer is rendered valid by the conſent of the creditor and transferee. The conſent of the creditor is requiſite, becauſe the debt (the thing transferred) is his due; and mankind being of different diſpoſitions with reſpect to the payment of debts, it is therefore neceſſary to obtain his conſent.—The conſent of the *tranſferee* is alſo requiſite, becauſe by the contract of transfer an obligation of debt is impoſed upon him, and ſuch obligation cannot be impoſed without his conſent.—The conſent of the *principal*, on the contrary, is not requiſite, becauſe (as *Mohammed* obſerves in the *Zeeadât*) the engagement of the transferee to pay the debt is an act relative to himſelf, which is attended with a benefit to the principal, and is no way injurious to him, inaſmuch as the transferee has no power of reverting to him, in caſe of having accepted the obligation without his deſire.

It exempts the debtor from any demand,

WHEN a contract of transfer is completed, the *Maheel*, or perſon who makes the transfer, is exempted from the obligation of the debt, becauſe of the acquieſcence of the transferee.—*Ziffer* has ſaid that he is not exempted, becauſe of the analogy which ſubſiſts between this caſe and that of bail; for they are both contracts of ſecurity or corroboration; and as, in the caſe of bail, the perſon who is bailed does not become exempted from the debt, ſo neither ought the transferrer in this caſe.—Our doctors, on the other hand, agree that *Hawâlit* literally means *removal*; and when a debt is removed from the faith of one perſon, it cannot afterwards remain upon it.—Bail, on the contrary, means a junction; and the intendment of it is, that the bailer unites his faith to that of the ſuretee with reſpect to the claim.—Now the decrees of the law proceed according to the literal meaning; and the object of transfer, namely, *corroboration*, is obtained when a perſon that is rich and a fair dealer acquieſces in the obligation of the debt, as it is to be ſuppoſed that he will readily fulfil his obligation.

Objection.—If the debt ſhift from the faith of the debtor to that of the transferee, it would follow that there can be no compulſion on the creditor to receive payment from the debtor, where he offers to diſcharge the debt; in the ſame manner as a creditor is not compellable to receive payment of his debt from a ſtranger in a gratuitous manner.

Reply.—The creditor is compellable to receive payment of the debt from the debtor, if he offer to make payment, becauſe the claim may eventually revert upon him, in caſe of the deſtruction of the debt; ſince if the transferee were to die inſolvent, without having paid the debt, the claim would revert upon the transferrer, for reaſons that will be ſhewn in the next caſe.—Hence, the payment of the tranſferrer cannot in every reſpect be conſidered as *gratuitous*, like that of a *ſtranger*.

unleſs the [illegible] come unable to fulfil, his engagement.

The creditor is not entitled to make any claim upon the tranſferrer, excepting where, his right on the transferee being deſtroyed, he cannot otherwiſe obtain it; in which caſe the debt reverts upon the transferrer.—*Shafeï* alleges that the creditor has no right to make any claim for his due upon the transferrer, although his right be deſtroyed; becauſe, in conſequence of the transfer, the transferrer becomes exempted from the debt; and this exemption is abſolute, and not reſtricted to the condition of payment from the transferee.—Hence the debt cannot revert upon the transferrer, except on account of ſome new cauſe; and none ſuch is to be found in this caſe.—The argument of our doctors is that, although the exemption be abſolute, in the *terms* of the contract, yet it is reſtricted, in the *ſenſe*, to the condition of the right being rendered to the creditor. The transfer is therefore diſſolved in caſe of his right being deſtroyed; becauſe the contract is capable of diſſolution, and may be diſſolved by the agreement of the parties.—The condition, moreover, of the ſafe delivery of the debt to the creditor, is equivalent to that of warranting the ſubject of a ſale to be free from blemiſh; that is to ſay, ſuch a warranty implicitly exiſts, as a condition, in *every* ſale, although it be not ſpecifically mentioned; and, in the ſame manner, the ſecurity of the debt exiſts, as a *condition*, in a contract of transfer, although not ſpecified in it.—The deſtruction of the debt due to the creditor in a caſe of transfer is eſtabliſhed, according to *Haneefa*, by one of two circumſtances. I. Where the transferee denies the exiſtence of the contract, upon oath, and the creditor cannot produce witneſſes to prove it. II. Where the transferee dies poor.—In the event of either of theſe circumſtances the debt is deſtroyed, ſince in neither caſe is it practicable for the creditor to receive payment from the transferee.—This is the true meaning of a deſtruction of the debt in a caſe of transfer.—The two diſciples maintain that a deſtruction of the debt is occaſioned by one of *three* circumſtances. Of theſe, two are the ſame with thoſe above recited; and the *third* is,—a declaration, by the magiſtrate, of the poverty of the transferee during his life-time.—This third circumſtance is not admitted by *Haneefa*; becauſe, according to his doctrine, poverty cannot be eſtabliſhed by the decree of the magiſtrate, ſince property comes in the morning and goes in the evening; but, according to the two diſciples, the decree of the magiſtrate eſtabliſhes poverty.

The tranſferee has a claim upon the debtor for

If the transferee ſhould demand, from the transferrer, the amount of what he has paid in virtue of the transfer made upon him, and the transferrer affirm that "he had made ſuch transfer upon "him, in exchange for a debt of the ſame amount which *he* owed "*him*," the affirmation of the transferrer is not admiſſible, and he is bound to pay the demand of the transferee, becauſe the *reaſon*

reaſon of ſuch demand, (namely, *the actual payment of it by his deſire*) is eſtabliſhed.—The transferrer, moreover, aſſerts a claim which the other denies; and the affirmation of the defendant is creditable.

Objection.—It would appear that the affirmation of the tranſferee is not to be credited, although he be the defendant; becauſe he has acknowledged what he afterwards denies, inaſmuch as his acceptance of the transfer is a virtual acknowledgment of the debt he owes to the transferrer.

Reply.—The acceptance of the transfer is not an acknowledgment of debt due to the transferrer, becauſe contracts of tranſfer are ſometimes made without the transferee's owing any thing to the transferrer.

A debtor may transfer his debt upon a property in the hands of another perſon.

If a perſon, having depoſited a thouſand *dirms* with another, ſhould afterwards make a transfer on it, (as if he were to deſire his creditors to receive payment of his debt, from a depoſit placed by him with ſuch a perſon,) ſuch transfer is valid, becauſe the truſtee is capable of diſcharging the debt from the depoſit.—If, however, the depoſit be deſtroyed, the transferee (who is otherwiſe a *truſtee*) is in ſuch caſe releaſed from the engagement of transfer; becauſe the transfer was reſtricted to the depoſit, ſince the truſtee engaged no further than the payment of the debt from the amount of the actual depoſit.—It is otherwiſe with reſpect to a transfer reſtricted to *uſurped* property; for if a perſon were to make a tranſfer on an uſurper, on account of ſpecific property uſurped by him, and the ſaid property be afterwards deſtroyed, the transfer ſo made does not become null: on the contrary, it is incumbent on the uſurper to pay the creditor a ſimilar,—or the value, in caſe the property in queſtion had not been an article of which the unities were ſimilar;—becauſe, as a ſimilar or the value is a repreſentative of the thing itſelf, the property in this caſe is not held to have been deſtroyed.

It

A transfer may be reſtricted to what is due from the transferee to the debtor.

It is to be obſerved that transfers are ſometimes reſtricted to debts due by the transferee to the transferrer;—and in all caſes of ſuch reſtricted transfers, the law invariably is that the transferrer has no right to make any claim upon the transferee, for the ſubſtance or the debt upon which he has made ſuch transfer; becauſe the right of the creditor is connected with it, in the ſame manner as that of a pawnholder is connected with the pawn; and alſo becauſe, if ſuch a right remained with the transferrer, the act of transfer (which is the right of the creditor) would be rendered null.—It is otherwiſe with reſpect to an *abſolute* transfer; (that is, where a perſon ſimply ſays to his creditor "I have tranſ"fered the debt I owe you upon a particular perſon," without making any mention of debt being due to him, or of ſpecific property of his being in the poſſeſſion of that perſon, whether from depoſit or uſurpation;) for in this caſe the right of the creditor does not relate to the property of the transferrer, but reſts entirely upon the faith of the transferee; and hence if the transferrer ſhould receive payment of the ſubſtance or debt due to him from the tranſferee, ſtill the transfer does not become null.

The loan of money in the manner of

Sifitja is abominable †; *that is to ſay*, the giving of a loan of any thing in ſuch a manner as to exempt the lender from the danger of the road; as, for inſtance, where a perſon gives ſomething by way of loan, inſtead of a depoſit, to a merchant, in order that he may forward it to his friend at a diſtance.—The abomination in this caſe is founded on the loan being attended with profit, inaſmuch as it exempts the lender from the danger of the road; and the prophet has prohibited our acquiring profit upon a loan.

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† That is to ſay, it is diſapproved, although not abſolutely *illegal.* (See the meaning of the term *abominable*, p. 428.)

HEDÂYA.

BOOK XX.

Of the Duties of the KAZEE.

Chap. I. Introductory.
Chap. II. Of Letters from one *Kâzee* to another.
Chap. III. Of Arbitration.
Chap. IV. Of the Decrees of a *Kâzee* relative to inheritance.

CHAP. I.

A *Kâzee* muſt [illegible] of a *witneſs.*

THE authority of a *Kâzee* is not valid, unleſs he poſſeſs the qualifications neceſſary to a witneſs; that is, unleſs he be free, ſane, adult, a *Muſſulman*, and unconvicted of ſlander; becauſe the rules with reſpect to juriſdiction are taken from thoſe with reſpect to evidence, ſince both are analogous to *authority*; for *authority* ſignifies *the paſſing or giving effect to a ſentence or ſpeech affecting another, either with or without his conſent*; and evidence and juriſdiction are both of this nature.—(The rules with reſpect to juriſdiction are here ſaid to be "*taken from thoſe with reſpect to evidence*," becauſe, as the ſentence of the *Kâzee* is in conformity with the teſtimony of the witneſs, it follows that the evidence is, as it were, the *principal*, and the decree of the *Kâzee* the *conſequent*.)—As therefore, juriſdiction, like evidence, is analogous to authority, it follows that whoever poſſeſſes competency to be a witneſs is alſo competent to be a *Kâzee*; and alſo, that the qualifications requiſite to a witneſs are in the ſame manner requiſite to a *Kâzee*—and likewiſe, that an unjuſt* man is qualified to be a *Kâzee*; whence if ſuch a perſon be created a *Kâzee*, it is valid, but ſtill it is not *adviſeable*; in the ſame manner as holds with reſpect to evidence;—that is, if a *Kâzee* accept the evidence of an unjuſt man, it is valid, in the opinion of all our doctors; but ſtill it is not *adviſeable* to admit the teſtimony of ſuch a perſon, ſince an unjuſt man is not deſerving of credit.

He does not forfeit his office by miſconduct.

IF a *Kâzee* be a juſt man at the time of his appointment, and afterwards, by taking of bribes, prove himſelf an unjuſt man, he does not by ſuch conduct become diſcharged from his office,—but he is, nevertheleſs, *deſerving* of a diſmiſſion.—This is the doctrine of the *Zâhir Rawâyet*; and it has been adopted by modern lawyers.—*Shafeï* maintains that an unjuſt man is incapable of the office of *Kâzee*, in the ſame manner as (in his opinion) he is incompetent to give evidence.—It is related in the *Nawadir*, as an opinion of our three doctors, that an unjuſt man is incapable of diſcharging the duties of a *Kâzee*.—Some of the moderns have alſo given it as their opinion that the appointment of a man *originally* unjuſt, to the office of *Kâzee*, is valid; but that if, having been juſt at the time of his appointment, he afterwards become

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* Arab. *Fâſik*.—In ſome inſtances the term applies merely to a perſon of looſe character and indecorous behaviour. (See Vol. I. p. 74.) In the preſent inſtance, however, the character alſo includes *want of integrity*, as appears a little lower down.

come unjuſt, he ſtands diſcharged from his office; becauſe, as the Sultan appointed him from a confidence in his integrity, it is to be preſumed that he will not acquieſce in his diſcharge of the duty *without* integrity.

A *Mooftee* muſt be a perſon of good character.

A QUESTION has ariſen, whether an unjuſt man be capable of being a *Mooftee**; and on this ſubject different opinions have been given.—Some have ſaid that he is incapable of being a *Mooftee*, becauſe the giving of a *Fitwa* (or ſtatement of the law applicable to any caſe) is connected with religion, and the word of an unjuſt man is not creditable in matters relative to religion.—Others again have ſaid, that an unjuſt man is capable of being a *Mooftee*, becauſe of the probability that he will toil and labour in the diſcharge of his duty, leſt the people charge him with his faults. The former, however, is the better opinion.—Some have eſtabliſhed it as a condition, that a *Kâzee* be a *Moojtàhid*†: the more approved doctrine is, however, that this is merely *preferable*, but not *indiſpenſable*.

An *ignorant*

THE appointment of an *ignorant* man to the office of *Kâzee* is valid, according to our doctors.—*Shafeï* maintains that it is not valid; for he argues that ſuch appointment ſuppoſes a capability of iſſuing decrees, and of deciding between right and wrong; and theſe acts cannot be performed without knowledge.—Our doctors, on the other hand, argue that a *Kâzee*'s buſineſs may be to paſs decrees merely on the opinions of others.—The object of his appointment, moreover, is to render to every ſubject his juſt rights; and this object is accompliſhed by paſſing decrees on the opinions of others.

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* *Anlgice*, an expounder of the LAW.—As the offices of *Kâzee* and *Mooftee* are frequently confounded by European writers, it may not be improper to remark, in this place, that the word *Kâzee* (or *Cadi*) is derived from *Kàzá*, ſignifying *juriſdiction*, and *Mooftee* from *Fitwa*, meaning an *application* or *ſtatement* of the LAW.—The *Mooftee*, therefore, is the officer who *expounds* and applies the law to caſes, and the *Kâzee* the officer who gives it operation and effect.

† *Moojtàbid* is the higheſt degree to which the learned in the law can attain, and was formerly conferred by the *Madriſas*, (or colleges); of which one of the firſt inſtances occurs in the life of *Haneefa*, whom all the learned acknowledge as their ſuperior.

It is the duty of reig point fit perſons to that office.

IT is incumbent on the Sultan to ſelect for the office of *Kâzee* a perſon who is capable of diſcharging the duties of it, and paſſing decrees; and who is alſo in a ſuperlative degree juſt and virtuous; for the prophet has ſaid, "*Whoever appoints a perſon to the diſcharge of any office, whilſt there is another amongſt his ſubjects more qualified for the ſame than the perſon ſo appointed, does ſurely commit an injury with reſpect to the rights of* GOD, *the* PROPHET, *and the* MUSSULMANS."—It is to be obſerved that a *Moojtàhid* means either a perſon who is in a high degree converſant with the *Hadees* or actions and traditional ſayings of the prophet, and who has alſo a knowledge of the application of the law to caſes; or one who has a deep knowledge of the application of the law to caſes, and alſo ſome acquaintance with the *Hadees*.—Some have ſaid that he ought alſo to have a knowledge of the cuſtoms of mankind, as many of the laws are founded upon them.

A perſon may confide his own

THERE is no impropriety in ſelecting for the office of *Kâzee* a perſon who has a thorough confidence in his ability to diſcharge the duties of it; becauſe the companions of the prophet accepted this appointment; and alſo, becauſe the acceptance of it is a duty incumbent on mankind.

but not one

IT is abominable to ſelect a perſon for the office of *Kâzee* who ſuſpects that he is incapable of fulfilling the duties of it, and who is not confident of being able to act with a ſtrict regard to juſtice, becauſe the ſelection of ſuch a perſon is a cauſe of the propagation of evil.—Several of our doctors, however, have ſaid that the acceptance of the office of *Kâzee* without compulſion is abominable, becauſe the prophet has ſaid, "*Whoever is appointed Kâzee ſuffers the ſame torture with an* "*animal, whoſe throat is mangled, inſtead of being cut by a ſharp* "*knife.*"—Many of the companions, moreover, declined this appointment; and *Haneefa* perſiſted in refuſing it, until the Sultan cauſed him to be beaten in order to enforce his acceptance of it; but he ſuffered with patience rather than accept the appointment. Many others, in former times, have alſo declined this office.—*Mohammed* remained thirty and odd days, or forty and odd days, in impriſonment, and then accepted the appointment.—In fact, the acceptance of the office of *Kâzee*, with an intention to maintain juſtice, is approved, although it be more laudable to decline it; becauſe it is a great undertaking, and notwithſtanding a perſon may have accepted it from an opinion that he ſhould have been able to maintain juſtice, yet he may have erred in this opinion, and afterwards ſtand in need of the aſſiſtance of others when ſuch aſſiſtance is not to be had.—Hence it is moſt laudable to decline it;—unleſs, however, there be no other perſon ſo capable of diſcharging the duties of it, in which caſe the acceptance of it is an incumbent duty, as it tends to preſerve the rights of mankind, and to purge the world of injuſtice.

The appointment muſt not be *ſolicited* or *coveted.*

It becomes *Muſſulmans* neither to covet the appointment of *Kâzee* in their hearts, nor to deſire it with their tongues; becauſe the prophet has ſaid, "*Whoſoever ſeeks the appointment of Kâzee ſhall be left* "*to himſelf; but to him who accepts it on compulſion, an angel ſhall de*"*ſcend and give directions*;" and alſo, becauſe whoſoever deſires this appointment ſhews a confidence in himſelf, which will preclude him from inſtruction; and whoever, on the other hand, puts his truſt in God, will be ſecretly inſpired with a knowledge of what is right in the diſcharge of his office.

It is lawful to accept the office of *Kâzee* from a tyrannical Sultan*, in the ſame manner as from a juſt Sultan; becauſe ſome of the companions accepted this office from *Moaviah*[*], notwithſtanding the right of government during his time remained with *Alee*; and alſo, becauſe ſome of the followers[†] accepted it from *Hijàj*[‡], who was a tyrant.—Hence the acceptance of the office of *Kâzee* from a tyrant is lawful;—provided, however, the tyrant do not put it out of the power of the *Kâzee* to render right to the people; for otherwiſe the acceptance of it would not be lawful, as the end of the appointment could not then be anſwered.

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* The term *tyrannical*, when applied to a *ſovereign*, generally ſignifies his being an *uſurper.*

A *Kâzee*, on

cords, &c. ap-

Whenever a perſon is appointed to the office of *Kâzee*, it is incumbent on him to demand the *Dewàn* of the former *Kâzee*.—By the *Dewàn* is meant the bags in which the records and other papers are kept; for thoſe muſt be preſerved to ſerve as vouchers on future occaſions.—Theſe bags, therefore, muſt always remain in the hands of the perſon poſſeſſing the judicial authority; and as the judicial authority reſts, for the time being, with the perſon appointed to the office, he muſt therefore require them from the *Kâzee* who has been diſmiſſed.—It is to be obſerved that the papers, in which ſuch proceedings &c. are written, muſt neceſſarily be the property either of the public treaſury, of the litigants, or of the diſmiſſed *Kâzee*.—Still, however, in all theſe caſes, the new-appointed *Kâzee* has a right to demand them from the late one:—in the *firſt* caſe, evidently; and in the *ſecond*, becauſe the litigants left the ſaid papers in the hands of the late *Kâzee*, that he

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[*] *Moaviah*, the ſon of *Abee Sifwan*. He had been originally appointed, by *Othman*, to the government of Syria; and ſuſpecting *Alee* to be inſtrumental to the death of his patron *Othman*, (who was ſometime after ſlain in an inſurrection) refuſed to acknowledge him on his being elected to ſucceed *Othman*, and in the end obtained the *Khalifat* for himſelf, being the firſt *Khalif* of the houſe of *Ommiah*, commonly termed the *Ommiad Khalifs*.

[†] Arab. *Tabayeen*.—A title given to thoſe doctors, &c. who ſucceeded the *Iſhàb*, or *companions* of the prophet.

[‡] *Hijàj Bin Yooſafal Sàkifee*.—He had been originally appointed Governor of Arabian *Iràk* by *Abdamâlik*, the 5th *Khalif* of the houſe of *Ommiah*, after which he defeated *Abdalla bin Zabair*, who had aſſumed the title.

might act according to them; and as his power
devolves upon the new *Kázee*, he is of courſe entitled to receive
and alſo in the *third* caſe, becauſe the late *Kázee* did not
as *property*, but merely as the *inſtruments of juſtice*; and hence it is
the ſame as if he had devoted them to

through his *Ameens*, who inveſti-

It is requiſite that the new *Kázee* ſend two *Ameens**, in order to take poſſeſſion of the bags of the *Dewan* in the preſence of the late *Kázee*, or in the preſence of his *Ameen*. It is alſo neceſſary that they aſk and inquire of the late *Kázee*, which are the papers that regiſter his proceedings? and which are thoſe that eſtabliſh guardians for the property of orphans? and that then the late *Kázee* arrange the ſeveral deſcriptions of papers in different bags, in order that no doubt may ariſe to the new *Kázee*.—It is to be obſerved, however, that this inveſtigation is merely for the ſake of knowledge, and not for the purpoſe of impeachment.

and muſt inquire and decide concerning priſoners confined upon any legal claim,

It is requiſite that the new-appointed *Kázee* examine into the ſtate of the priſoners, becauſe this is one of the duties of his office.—Whoever of them makes an acknowledgment of right in favour of others, the new *Kázee* muſt render it obligatory upon him, as acknowledgment induces obligation on the acknowledger.—Whoever of them, on the contrary, makes a *denial*, the new *Kázee* muſt not credit the affirmation of the late *Kázee* with reſpect to him unleſs ſupported by evidence, becauſe, in conſequence of his diſmiſſion, his affirmation carries no more authority than that of any of the people in general; and the evidence of one perſon is not proof, more eſpecially when ſuch evidence relates to an action of his own.—If the late *Kázee* ſhould not be able, in this laſt inſtance, to produce evidence, ſtill the new one muſt not immediately releaſe ſuch priſoner; on the contrary, he muſt iſſue proclamation and uſe circumſpection; that is, he muſt cauſe a perſon to proclaim, every day, that "the *Kâzee* directs that "whoſoever has any claim againſt ſuch a priſoner do appear and be "confronted with him."—If any perſon appear accordingly, and prefer a claim againſt the priſoner, the *Kâzee* muſt deſire him to produce evidence:—but if no perſon appear, he muſt then releaſe the priſoner, provided he ſee it adviſeable.—He muſt not, however, *precipitate* his enlargement, before theſe precautions have been taken; becauſe the impriſonment of him by the former *Kâzee* having been done apparently with reaſon, it is probable, if he ſhould haſtily releaſe him, that the claimant againſt him might loſe his right.

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* *Anglice*, truſtees or confidants. It is the name of an office in the *Kázee*'s court, in the manner of a *regiſter*. It alſo ſignifies an *inquiſitor*.

cerning depoſits of conteſted property.

It is requiſite that the new *Kâzee* examine into

which the diſmiſſed *Kâzee* may declare to be in the hands of particular perſons, and alſo into the proceeds ariſing from the *Wakfs* [charitable appropriations] of *Muſſulmans*,—and that he act with theſe according to ſuch evidence as may be eſtabliſhed concerning them, or according to the acknowledgment of the perſon in whoſe hands are the depoſits or the proceeds of *Wakf*, becauſe evidence and acknowledgment are both proofs:—but he muſt not credit the affirmation of the late *Kâzee*;—unleſs the perſon in whoſe hands the property lies avow that "the ſaid property was given in charge to him by the *Kâzee*;" in which caſe the new *Kâzee* may credit the affirmation of the old one with regard to ſuch property, as it here appears, from the truſtees acknowledgment, that the property in queſtion *had been* in the poſſeſſion of the diſmiſſed *Kâzee*, whence it may be ſaid to be *ſtill* in his hands:—his affirmation, therefore, with reſpect to ſuch property, muſt, in this caſe, be credited.—This proceeds on a ſuppoſition that the actual poſſeſſor had *from the beginning* acknowledged the diſmiſſed *Kâzee*'s conſignment of the property to him: for if he ſhould firſt have declared “this property belongs to *Zeyd*,” (for inſtance,) and afterwards, “the diſmiſſed *Kâzee depoſited* this with “me,” and the *Kâzee* affirm it to be the property of ſome *other* than *Zeyd*, in this caſe he [the poſſeſſor] muſt give the property to *Zeyd*, in favour of whom he made the firſt acknowledgment, as his right is rendered preferable by ſuch acknowledgment; and he muſt then give a compenſation, alſo, to the diſmiſſed *Kâzee*, becauſe of his having afterwards acknowledged that “the ſaid property was in his cuſtody;”—and the diſmiſſed *Kâzee* muſt give the compenſation ſo received to the perſon in favour of whom he makes the affirmation.

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* Meaning, controverted property, held by the *Kâzee* until the iſſue of the ſuit or litigation, and which he delivers over to ſome perſon to keep, in the manner of a truſt.

xe-
cute his duty
in a *moſque*—
or other public place;

It is requiſite that the *Kâzee* ſit openly in a moſque for the execution of his office, in order that his place may not be uncertain to travellers or to the inhabitants of the town.—The *Jâma* moſque * is the moſt eligible place, if it be ſituated within the city, becauſe it is the moſt notorious.—*Shafeï* maintains that it is abominable for a *Kâzee* to ſit in a moſque for the execution of his duty, ſince polytheiſts are admitted into the court of the *Kâzee*, and theſe are declared in the KORAN to be *filth*.—Moreover, women during their monthly courſes may enter the court of the *Kâzee*, but are not allowed admiſſion into a moſque.—The arguments of our doctors on this point are twofold. FIRST, the prophet has ſaid “*moſques are intended for the praiſe of God and the paſſing of decrees*;” and he moreover decided diſputes between litigants in the place of his *Yettekâf* [a particular penance] by which muſt be underſtood a moſque: beſides, the *Raſhedian Khalifs* ſat in moſques, for the purpoſe of hearing and deciding cauſes.—SECONDLY, the duty of a *Kâzee* is of a pious nature, and is therefore performed in moſques in the ſame manner as prayers are offered there.—In anſwer to *Shafeï*, it is to be obſerved, that as the impurity of polytheiſts relates to their *faith* and not to their *externals*, they are not therefore prohibited from entering a moſque; and with reſpect to menſtruous women, they have it in their power to give notice of their caſe to the *Kázee*, who may then go out and meet them at the gate of the moſque, or depute ſome other for that purpoſe, as is done where the caſe is of a nature unfit for public diſcuſſion.

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* The *Jâma* moſque is the principal moſque in a town, where public prayer is read every Friday: in oppoſition to a *Mûsjid*, which ſignifies a ſmaller moſque, where public prayer is not read.

THERE is no impropriety in the *Kâzee*'s ſitting in his own houſe to paſs judgment; but it is requiſite that he give orders for a free acceſs to the people.

or in hi houſe;

IT is requiſite that ſuch people ſit along with the *Kâzee* as were uſed to ſit with him prior to his appointment to the office; becauſe, if he were to ſit alone in his houſe, he would thereby give riſe to ſuſpicion.

and accompanied by his uſual aſſociates.

THE *Kâzee* muſt not accept of any preſents, excepting from relations allied to him within the prohibited degrees, or thoſe from whom he was uſed to receive them prior to his appointment; neither of which can be eſteemed to be on account of his office, the one being in conſequence of relationſhip, and the other of old acquaintance.—Excepting theſe, therefore, he muſt not accept preſents from any perſon, as theſe would be conſidered as given to him on account of his office, and ſuch it is unlawful for him to enjoy.—If, alſo, his relation within the prohibited degrees, having a cauſe depending before him, ſhould offer him a preſent, it is incumbent on him to refuſe it.—So likewiſe, if any perſon accuſtomed to ſend him preſents prior to his appointment ſhould ſend him more than uſual,—or if, having a ſuit before him, he ſhould ſend him any preſents whatever; in neither caſe is it lawful for him to accept them, ſince they would be conſidered as given to him in conſequence of his office, and hence an abſtinence from ſuch is indiſpenſible.

He muſt not

cept from *re-lations* or *inti-*

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nor of any *feaſt* or *entertainment*.

The *Kâzee* muſt not accept of an invitation to any entertainment, excepting a general one; becauſe a particular entertainment would be ſuppoſed to have been given on account of his office, and his acceptance of it would therefore render him liable to ſuſpicion: in oppoſition to the caſe of a *general* one.—This ordinance, which has been adopted by the two *Elders*, applies equally to the feaſts of relations and others.—It is related, as an opinion of *Mohammed*, that the *Kâzee* may accept of an invitation to a feaſt from his *relation*, although it be a *particular* one, in the ſame manner as he is permitted to accept of *preſents* from him.—It is to be obſerved that a *particular* entertainment means ſuch as depends entirely on the preſence of the *Kâzee*; that is, ſuch as would not take place in caſe of his abſence; and a *general* one is the reverſe.

He muſt attend funerals, the ſick.

It is fitting that the *Kâzee* attend at funeral prayers; and alſo, that he viſit the ſick; for theſe are amongſt the duties of a *Muſſulman*, inaſmuch as the prophet, in enumerating ſix incumbent offices of the *Muſſulmans* towards each other, mentioned funeral prayers and the viſiting of the ſick.—But it is requiſite that, on theſe occaſions, he make no unneceſſary delay, nor permit any perſon to hold a converſation on the ſubject of his ſuit, leſt he ſhould thereby afford room for ſuſpicion.

Precautions requiſite in his general conduct and be-

The *Kâzee* muſt not give an entertainment to one of the parties in a ſuit without the other; becauſe the prophet has prohibited this; and alſo, becauſe it is of a ſuſpicious nature.

When the two parties meet in the aſſembly of the *Kâzee*, he muſt behave to both (in regard to making them *ſit down*, and the like) with an equal degree of attention; becauſe the prophet has ſaid, "*Let a ſtrict equality be obſerved towards the parties in a ſuit with* "*reſpect to their ſitting down, or directing them, or looking towards* "*them.*"

THE *Kâzee* muſt not ſpeak privately to either of the parties, or make ſigns towards him, to give him inſtructions or ſupport his argument; for, beſides giving riſe to ſuſpicion, he would thereby depreſs the other party, who might be induced to forego his claim, from an opinion that the *Kâzee* was biaſſed towards the other.

THE *Kâzee* muſt not ſmile in the face of one of the parties, becauſe that will give him a confidence above the other; neither muſt he give too much encouragement to either, as he would thereby deſtroy the proper awe and reſpect due to his office.

and in his conduct towards witneſſes in court, or whilſt giving evidence.

IT is abominable in the *Kâzee* to *prompt* or *inſtruct* a witneſs, by ſaying to him, (for inſtance) "Is not your evidence to this or to "that effect?" Becauſe aſſiſtance is thereby, in effect, given to one of the parties; and it is therefore abominable, in the ſame manner, as it would be to inſtruct either of the parties themſelves.—*Aboo Yooſaf* has ſaid that inſtruction to a witneſs, on an occaſion free from ſuſpicion, is laudable;—becauſe a witneſs may ſometimes be at a ſtand from the awe with which he is ſtruck in the aſſembly of the *Kâzee*; and in ſuch caſe to encourage him, in order to give life to the right of his party, is the ſame as the deputing of a perſon to compel the appearance of the defendant in court, which is lawful, notwithſtanding it be an aſſiſtance to the plaintiff.—As, alſo, it is lawful to exact bail from the defendant, although an aſſiſtance be thereby given to the plaintiff; in the ſame manner it is lawful to give encouragement to a witneſs, to preſerve his right, although aſſiſtance be thereby offered to one of the parties.

He muſt not give judgment at a time when his underſtanding is not perfectly clear and unbiaſſed.

THE *Kâzee* muſt not give judgment when he is hungry or thirſty, becauſe ſuch ſituations diminiſh the intellect and underſtanding of the perſon affected by them. Neither muſt he give judgment when he is in a paſſion, or when he has filled his ſtomach with food, becauſe the prophet has ſaid "*Let not the magiſtrate decide between diſputants* "*when he is angry or full.*"

A YOUNG *Kâzee* ought to ſatisfy his paſſion with his wife before he ſits in the court, that he may not be attracted by the view of women that may be preſent there.

SECTION.

Of IMPRISONMENT.

Rules in im-

WHEN a claimant eſtabliſhes his right before the *Kâzee*, and demands of him the impriſonment of his debtor, the *Kâzee* muſt not precipitately comply, but muſt firſt order the debtor to render the right; after which, if he ſhould attempt to delay, the *Kâzee* may impriſon him.—This is related in *Kadooree*; and it proceeds on the principle, that *impriſonment* is the puniſhment of *delay*;—whence it is neceſſary firſt to order him to reſtore the right to its owner, that his delay may be made apparent.—This is where the right is eſtabliſhed by the debtor's acknowledgment; for in that caſe the non-payment on the firſt demand is not conſtrued into *delay*, becauſe it is poſſible that the debtor expects a reſpite, and therefore has not brought the money along with him. But if he ſhould delay after the decree of the *Kâzee*, he muſt then be impriſoned, as his *delay* is then evident.—Where, on the other hand, the right is eſtabliſhed by evidence, the defendant muſt be impriſoned immediately on the eſtabliſhment of it; becauſe his denial, which occaſioned the neceſſity of proof by evidence, furniſhes a ſufficient argument of his intention to delay.

If a defendant, after the decree of the *Kâzee* againſt him, delay the payment in a caſe where the debt due was contracted for ſome equivalent, (as in the caſe of goods purchaſed for a price, or of money, or of goods borrowed on promiſe of a return,) the *Kâzee* muſt immediately impriſon him, becauſe the property he received is a proof of his being poſſeſſed of wealth.—In the ſame manner, the *Kâzee* muſt impriſon a refractory defendant who has undertaken an obligation in virtue of ſome contract, ſuch as marriage or bail, becauſe his voluntary engagement in an obligation is an argument of his poſſeſſion of wealth, ſince no one is ſuppoſed to undertake what he is not competent to fulfil.—If, alſo, in this caſe, he plead *poverty*, this plea is nevertheleſs rejected, and the plaintiff's aſſertion (of his being poſſeſſed of wealth) credited.—It is to be obſerved, that the obligation contracted from *marriage*, as here mentioned, relates only to the *Mihr Mooâjal*, or *prompt* dower, and not to the *Mihr Mowjil*, or *deferred* dower, becauſe an engagement to pay a future debt does not argue the poſſeſſion of wealth.—In caſes, alſo, of debt of any other deſcription, (ſuch as a compenſation for *uſurped* property, amercement for a crime, the conſideration of *Kitâbat*, compenſation for the freedom of a partnerſhip ſlave, the maintenance of a wife, and ſo forth,) the *Kâzee* muſt not impriſon the defendant when he pleads poverty; becauſe none of theſe acts indicate the poſſeſſion of wealth, and therefore his declaration of poverty muſt be credited.—If, however, the plaintiff prove that he is poſſeſſed of wealth, the *Kâzee* muſt in that caſe impriſon the debtor, under any of the above circumſtances.—The diſtinctions here ſtated are from the *Zâhir Rawâyet.*—It is ſaid, by other authorities, that the aſſertion of the plaintiff muſt be credited in every caſe of debt; that is, whether the debt be contracted in exchange for an equivalent, or voluntarily engaged for by the party; becauſe poverty is the original ſtate of man, and wealth merely ſupervenient, and thus the natural condition of man is an argument of the truth of the defendant's declaration of poverty.—There is alſo another tradition, that the defendant's declaration of poverty

In an award of debt, the defendant muſt be impriſoned immediately on neglecting to comply with the decree,—provided it be incurred for an equivalent, or by a contract of marriage;

and alſo in every other inſtance, if the creditor prove his capacity to diſcharge it.

is creditable in every caſe of debt, excepting ſuch as is contracted in exchange for an equivalent.

Caſe of a wife ſuing for her maintenance.

If a wife demand her ſubſiſtence from her huſband, and he plead poverty, his declaration, corroborated by an oath, is to be credited.—In the ſame manner, if a perſon emancipate his ſhare in a partnerſhip ſlave, and his partner demand a compenſation for his ſhare, and he plead poverty, his declaration is to be credited.

Objection.—Theſe two caſes are conformable to the two laſt quoted traditions: but they are repugnant to the doctrine of the *Zâhir Rawâyet*; for although, in virtue of the marriage in the one caſe, and the emancipation of the joint ſlave in the other, there exiſts in both a voluntary engagement of reſponſibility, which indicates the poſſeſſion of wealth, ſtill his declaration of poverty is nevertheleſs declared to be creditable.

Reply.—Subſiſtence to a wife is not an *abſolute* debt, (that is, ſuch as can be rendered void only by payment or exemption,) for it becomes void, according to all our doctors, without payment or exemption, in caſe of *death*.—In the ſame manner alſo, compenſation for freedom is not an abſolute debt, according to *Haneefa*, being in his opinion the ſame as the conſideration of *Kitâbat*;—and the doctrine of the *Zâhir Rawâyet* alludes only to *abſolute* debts.
—In a caſe where the defendant pleads poverty, and the plaintiff proves, by evidence, his poſſeſſion of wealth, the *Kâzee* muſt impriſon him [the defendant] for two or three months; after which it is requiſite that he make an inveſtigation into his circumſtances; and if, upon ſuch inveſtigation, the people ſay he is wealthy, let him be continued in confinement:—but if they ſay he is poor, let him be releaſed; becauſe he ſtands in need of an allowance of time to enable him to acquire wealth; and the continuance of his impriſonment is, in ſuch caſe, an oppreſſion.—In *Kadooree*'s abridgement, it is related that he is to be releaſed from confinement, but that the plaintiff is not to be prohibited from uſing importunity with him.—The caſe of importunity will be more fully

fully diſcuſſed hereafter in treating of *Hijr*.—The period of impriſonment is fixed at *two or three months*, for this reaſon, that as the impriſonment is inflicted on account of contumacy, in the debtor's withholding payment of the debt, notwithſtanding the *Kázee*'s order, the *Kázee* muſt therefore impriſon him until ſuch time as he reveal his property, in caſe he have any concealed; and as it is requiſite that the term be of ſome duration, to the end that this advantage may be obtained from it, *Mohammed* has therefore fixed it at the period abovementioned.—Other authorities fix it at one month, at five months, and at ſix months.—In fact, this is a point which muſt be left to the diſcretion of the *Kázee*; becauſe the conditions of men are various in regard to their endurance of the hardſhips of impriſonment, ſome being capable of bearing it longer than others; and hence the neceſſity of leaving it to the *Kázee* to act as he may deem beſt.—If the debtor prove his poverty by witneſſes, prior to the expiration of the preſcribed period *, in that caſe there are two traditions. According to one, the witneſſes are to be credited: but according to the other their evidence is not to be admitted.—Many of our modern doctors follow the latter opinion.—It is related, in the *Jama Sagheer*, that if a perſon make an acknowledgment of debt before the *Kázee*, he [the *Kázee*] muſt in ſuch caſe impriſon him, and muſt then make enquiry of the people into his circumſtances. If it appear that he is rich, he muſt in that caſe continue his impriſonment: but if his poverty be made apparent, he muſt releaſe him.—The compiler of the *Hedáya* remarks that this alludes to a perſon who, having at one time made an acknowledgment of debt to the *Kázee*, or to ſome other, afterwards diſcovers an intention of delay; for otherwiſe it would differ from the doctrine of *Kadooree*, before quoted, in which it is expreſsly declared that the *Kázee* t not immediately to impriſon a debtor after acknowledgment.—

Caſe of ac

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* This is an apparent contradiction to what immediately precedes concerning the diſcretionary power of the *Kázee* with reſpect to the period of impriſonment.—It is, however, merely a continuation of the doctrine of *Mohammed*, who has preſcribed a term.

(The compiler gives this explanation with a view to reconcile the doctrine of the *Jama Sagheer* with that of *Kadooree*.)

A huſband may be impri-ſoned for the maintenance of his wife: but a father at the ſuit of his ſon.

A HUSBAND may be impriſoned for the maintenance of his wife, becauſe in withholding it he is guilty of oppreſſion: but a father cannot be impriſoned for a debt due to his ſon, becauſe impriſonment is a ſpecies of ſeverity, which a ſon has no right to be the cauſe of inflicting on his father; in the ſame manner as in caſes of retaliation or puniſhment.—If, however, a father withhold maintenance from an infant ſon, who has no property of his own, he muſt be impriſoned; becauſe this tends to preſerve the life of the child; and alſo becauſe there is no other remedy, ſince *maintenance* (in oppoſition to *debt*) is annulled by the lapſe of time, and therefore it is neceſſary to prevent its deſtruction for the future.

CHAP. II.

Of Letters from one *Kâzee* to another.

Letters authenticated by evidence are admiſſible of

A LETTER from one *Kâzee* to another is admiſſible relative to all rights except puniſhment and retaliation, provided it be authenticated by evidence exhibited before the *Kâzee* to whom it is addreſſed, for which there is an abſolute neceſſity, as will be ſhewn hereafter.

Difference

IF witneſſes exhibit evidence, before a *Kâzee*, againſt a defendant, the ſubject of the ſuit being at a diſtance, the *Kâzee* may paſs a decree upon ſuch teſtimony, becauſe it eſtabliſhes proof. The decree ſo made is written down, and this writing is termed a *Sidjil* or *record*, and is not conſidered as the letter of one *Kâzee* to another*.—If, however, the evidence be given in the abſence of the defendant, the *Kâzee* muſt not paſs a decree, it being unlawful to do ſo in the abſence of the perſon whom it affects; but he muſt take down the evidence in writing, in order that the *Kâzee* to whom ſuch writing ſhall be addreſſed may uſe it as evidence.—This writing is termed *Kitâb-Hookmee*, or the letter of one *Kâzee* to another, and is a tranſcript of real evidence.—It is to be obſerved that the tranſmiſſion of letters of one *Kâzee* to another is reſtricted to ſeveral conditions, which will hereafter be explained; and the legality of it is founded on its neceſſity, ſince it may often be impoſſible for the plaintiff to bring the defendant and the evidences together in the ſame place, becauſe of the diſtance of their abodes.—Hence the letter of one *Kâzee* to another is, as it were, the evidence of evidence, or a branch from the trunk.—It is alſo to be obſerved that the term *rights*, above uſed, comprehends debts, and alſo marriage dowers, portions of heirs, uſurpations, conteſted depoſits, or *Mozâribat* ſtock denied by the manager; becauſe all theſe are equivalent to debt, and are capable of aſcertainment by deſcription, without the neceſſity of actual exhibition.—Letters from one *Kâzee* to another are alſo admiſſible in the caſe of immoveable property, becauſe it is capable of aſcertainment by a deſcription of its boundaries:—but they are not admiſſible with regard to *moveable* property, becauſe, in that caſe, there is a neceſſity for actual exhibition.—It is related as an opinion of *Aboo Yooſaf*, that letters from one *Kâzee* to another are admiſſible with reſpect to a *male* ſlave, but not with reſpect to a *female*, becauſe the probability of elopement is ſtronger in the one than the other.—It is alſo related as an opinion of his, that they are admiſſible with reſpect to both male and female ſlaves, but that particular conditions are requiſite to eſtabliſh

A letter is tranſmiſſible only on certain conditions.

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* This caſe ſuppoſes the thing in diſpute to be ſituated in the juriſdiction of a different *Kâzee* from him before whom the parties bring their ſuit; and the decree which in this caſe the *Kâzee* gives being written down, is carried to the other *Kâzee*, who is bound to ſee it enforced.

bliſh their admiſſibility, which will be explained in their proper place. —It is related as an opinion of *Mohammed*, that the letters of a *Kâzee* are admiſſible with reſpect to every ſpecies of moveable property; and this opinion has been adopted by our modern doctors.

The teſtimony requiſite to authenticate it.

THE letters of *Kâzees* are not admiſſible, unleſs authenticated by the teſtimony of two men, or of one man and two women; becauſe there is a ſimilarity between all letters, and it is therefore neceſſary to eſtabliſh their authenticity by complete proof,—that is, by evidence. —The grounds of this is, that theſe letters are binding in their nature, and therefore require to be completely proved.—It is otherwiſe with reſpect to the letters of *Hirbees* [Infidel aliens] to the *Imâm*, ſoliciting protection; for theſe require not to be proved by evidence, ſince they not binding in their nature, inaſmuch as it reſts with the *Imâm* to grant the protection or not at his pleaſure.—It is alſo otherwiſe with reſpect to the meſſage of a *Kâzee* to a *Moozkee* [purgator of witneſſes,] or with reſpect to the meſſage of a purgator to the *Kâzee*, for ſuch a meſſage has no force, conſidered as the meſſage of a purgator, but merely as being a corroboration of the teſtimony of witneſſes.

The contents muſt be previouſly explained to the authenticating witneſſes.

IT is incumbent on the *Kâzee* to read his letter in the preſence of the witneſſes who are to authenticate it, or to explain the contents of it to them, that they may have a knowledge thereof; becauſe evidence cannot be given without knowledge. Afterwards he muſt cloſe the letter, and affix his ſeal to it in their preſence, and then conſign it over to them, that they may have a ſecurity againſt any poſſibility of alteration in it.—This is according to *Haneefa* and *Mohammed*; and the reaſon is, that a knowledge of the ſubject of the letter, and an evidence of the affixture of the ſeal, are indiſpenſible requiſites; and in the ſame manner a remembrance of the contents is alſo requiſite; whence it is that the *Kâzee* muſt furniſh them with an open copy of the letter, with which they may refreſh their memory.—It is however related, as the laſt opinion of *Aboo Yooſaf*, that no one of theſe particulars is requiſite, it being ſufficient to atteſt that this is the letter and this the ſeal of the *Kâzee*; and it is alſo reported, from him, that the affixture of the ſeal is not neceſſary.—Hence it appears that, after his attaining the dignity of *Kâzee*, he conſidered this matter as of little conſequence; and his opinion is of great weight, ſince thoſe that only *hear* are not ſo competent to determine as thoſe that *ſee.*—*Shimſal-Ayma* has adopted the opinion of *Aboo Yooſaf.*

It muſt not be
the
ant.

WHEN a letter from a *Kâzee* arrives, the *Kâzee* to whom it is addreſſed ought not to receive it unleſs in the preſence of the defendant; becauſe as ſuch letter is equivalent to an exhibition of evidence, the preſence of the defendant is therefore indiſpenſible.—It is otherwiſe with reſpect to the other *Kâzee*'s hearing the evidence, becauſe that is done merely with a view to *tranſmit* it, and not to *paſs ſentence* upon it.

Forms to
of

WHEN the witneſſes bring the letter to the *Kâzee* to whom it is addreſſed, let him firſt look at the ſeal of it, and after hearing their teſtimony, (that " this is the letter of a particular *Kâzee*,"—that " he " delivered it to them in his court of judgment,"—that " he read " it in their preſence,"—and, that " he affixed his ſeal to it before " them,") let him then open and read it in the preſence of the defendant, and paſs a decree agreeably to the contents.—This is according to *Haneefa* and *Mohammed.*—*Aboo Yooſaf* has ſaid it is ſufficient for the witneſſes to atteſt that " this is the letter and ſeal of ſuch a " *Kâzee.*"—In the *Kadooree*, the proof of the integrity of the witneſſes prior to the opening of the letter is not made a condition.—The better opinion, however, is that it is a neceſſary condition; and the ſame has been declared by *Khaſáf*; for this reaſon, that there may eventually be a neceſſity to recur to other evidence, in caſe of a want of proof of the integrity of thoſe that brought it; and it would be impoſſible for any others to give their teſtimony unleſs the ſeal ſtill remained upon it: it is therefore abſolutely neceſſary that the *Kâzee* defer breaking the ſeal of the letter until the integrity of the bearers be proved.

It is rendered void by the death or diſmiſſion of the writer in the interim;

One *Kâzee* muſt not accept a letter from another, unleſs the *Kâzee* that wrote it be, at the time, ſtill fixed and eſtabliſhed in his office.—If, therefore, prior to the receipt of the letter, the *Kâzee* that wrote it ſhould have died, or have been diſmiſſed from his office, or have become diſqualified from the duties of it, from apoſtacy or inſanity, or from having ſuffered puniſhment for ſlander,—the *Kâzee* to whom the letter is addreſſed muſt then reject it; becauſe the author of it being at that period reduced to the level of the people, any information from him, independent of what relates to himſelf, or mutually to them both, is not admiſſible.—So likewiſe, if the *Kâzee* to whom the letter is addreſſed ſhould have died, another *Kâzee* muſt not open it, unleſs the addreſs run in this manner, "To the ſon of —— *Kâzee* of the "city of —— or to whatever *Kâzee* it may concern, this letter,"—in which caſe another *Kâzee* may receive it, becauſe he is comprehended in the addreſs from the ſpecification of his office and city.—If the addreſs, however, be merely, "To whatever *Kâzee* it may con- "cern," he is not entitled to open it, from the uncertainty of the addreſs.

or (unleſs *generally* addreſſed) by the death or diſmiſſion of him to whom it is tranſmitted.

If the defendant die previous to the arrival of the letter with the *Kâzee*, judgment muſt be paſſed upon it in preſence of his heir, as being his repreſentative.

It is not admiſſible in caſes of puniſhment or retaliation.

A letter from one *Kâzee* to another is not valid in caſes of retaliation or puniſhment; becauſe as in ſuch a letter there exiſts a ſemblance of ſubſtitution, (for the letter is not itſelf evidence, but merely a *ſubſtitute* for evidence,) it is therefore equivalent to evidence upon evidence; and as evidence upon evidence is not admitted in theſe caſes, the letter of a *Kâzee* cannot be admitted.

SECTION

SECTION.

A woman *Kâzee* in all caſes of property.

A WOMAN may execute the duties of a *Kâzee* in every caſe except puniſhment or retaliation, in conformity with the rule that the evidence of a woman is admiſſible in every caſe except in caſes of puniſhment or retaliation; for the rules of juriſdiction are derived from the rules of evidence, as was before ſtated.

A *Kâzee* is not at liberty to appoint a *deputy,* without the authority of the *Imâm*:

IT is not permitted to a *Kâzee* to appoint a deputy, unleſs he have received a ſpecial power from the *Imâm* to that effect; for although he have been himſelf appointed to the office of *Kâzee*, yet he has not been empowered to confer ſuch appointment on another.—Hence, in the ſame manner as it is unlawful for an agent to appoint an agent unleſs with the permiſſion of his conſtituent, ſo is it unlawful for a *Kâzee* to appoint a deputy unleſs by the authority of the *Imâm.*—It is otherwiſe with reſpect to a perſon appointed to read the Friday's prayers; for he may appoint a deputy to act for him, ſince if any delay ſhould happen in the performance of this ſervice, the prayers would become void and null, as the period for them is fixed: the appointment of a perſon to read theſe prayers, therefore, is virtually an argument of his being empowered to appoint a deputy to act for him, with a view to prevent the nullity of the ſervice:—contrary to *juriſdiction*, which not depending on a fixed period, is not therefore defeated by delay.

but the decrees of the deputy, paſſed in his preſence or with his [illegible] tion, are valid.

IF a *Kâzee*, not having power to appoint a deputy, ſhould nevertheleſs appoint one, and the ſaid deputy, either in preſence of the *Kâzee*, or in his abſence but with his approbation, paſs a decree, the decree ſo paſſed is valid;—in the ſame manner as where the agent of an agent performs any act in the preſence of the agent, or with his conſent, in which caſe ſuch act is valid.—The ground of this is that the decree being paſſed in the preſence of the *Kázee*, or with his approbation, and the act being performed in the preſence of the agent, or with his approbation, the judgment and reflection of the *Kázee* himſelf is therefore exerciſed in the caſe of the decree paſſed by his deputy,—and the judgment and reflection of the agent in the caſe of the deed done by his agent,—which is what was required.

If he appoint a deputy, by authority, he

If the *Imám* give authority to the *Kázee* to appoint whomſoever he pleaſed his agent, the perſon whom he appoints becomes in that caſe the deputy of the Sultan; and the *Kázee* is not entitled to diſmiſs him.

He muſt maintain and enforce the equal decrees of every other

It is incumbent upon every *Kázee* to maintain and enforce the decree of another *Kázee*, unleſs ſuch decree be repugnant to the doctrine of the *Koran*, or of the *Sonna*, or of the opinions of our doctors; in other words, unleſs it be a deciſion unſupported by authority.—It is related, in the *Jama Sagheer*, that if a *Kázee* paſs a decree in a matter concerning which different opinions have been given, and be afterwards ſucceeded by another *Kázee* of a different opinion with reſpect to that matter, the latter *Kázee* muſt nevertheleſs enforce the decree ſo made; for it is a rule that when a *Kázee* paſſes a decree in a doubtful caſe, the decree is executed accordingly; nor is it permitted to a ſucceeding *Kázee* to reſcind it, becauſe although the ſucceeding *Kázee* be equal in point of judgment to his predeceſſor, ſtill the judgment of the predeceſſor is in this inſtance allowed a ſuperiority, becauſe of its having been exerciſed in paſſing the decree; and therefore it cannot be affected by the judgment of his ſucceſſor, which is deemed inferior from its not having been exerciſed.

His determi-
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repugnant to

If a *Kázee*, in a doubtful caſe, determine contrary to his tenets, from having forgotten the principles of his ſect, ſuch decree muſt nevertheleſs be enforced, according to *Haneefa*.—If, on the contrary, he paſs ſuch decree knowingly, and not through forgetfulneſs, there are in that caſe two opinions recorded.—According to one, the decree muſt be enforced in *that* inſtance alſo, becauſe the error in it is uncertain.—In the opinion of the two diſciples the decree muſt not be enforced in either caſe; that is, whether the error be wilful, or proceed from forgetfulneſs: and this is the approved expoſition.—By a *doubtful* caſe is meant one in regard to which there is no particular ordinance, either by the word of God, or by the prophet, and concerning which, conſequently, different opinions have been ſupported by the companions and their followers.—Where a *great number*, however, have concurred, and only a *few* have differed, it is not conſidered as a *doubtful* caſe.

the tenets of his ſect.

EVERY thing of which the illegality is decreed by the *Kâzee* from apparent circumſtances, that is to ſay, from the teſtimony of witneſſes, although in reality ſuch teſtimony be falſe, is nevertheleſs *ipſo facto* unlawful.—* This is according to *Haneefa*: and he is alſo of the ſame opinion where the *Kâzee* decrees the *legality* of a thing; provided, however, that the claim of the plaintiff be founded on ſome determinate plea, ſuch as *purchaſe*, *leaſe*, or *marriage*,—as if, for inſtance, he ſhould claim a female ſlave by aſſerting that he had *purchaſed* her.

An article de-
[illegible]
though the evidence prove falſe.

THE *Kâzee* muſt not paſs a decree againſt an abſentee unleſs in the preſence of his repreſentative.—*Shafeï* maintains that it is lawful for a *Kâzee* to paſs a decree againſt an abſentee; becauſe, upon the eſtabliſhment of proof by teſtimony, the right in the judgment of the *Kâzee* becomes evident.—The arguments of our doctors upon this point are twofold.—FIRST, the paſſing of a decree on the teſtimony of witneſſes is with a view to put an end to contention; and as conten-

A decree cannot be paſſed againſt an abſentee but in preſence of his [illegible] tative:

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* For inſtance, if two people declare that there is a drop of wine in a particular veſſel of water, and the *Kâzee* in conſequence decree it to be unlawful, it muſt be conſidered as ſuch, although the falſity of their declaration be afterwards proved.

tion ſuppoſes a refuſal on the part of the defendant, it follows that as his abſence precludes the poſſibility of his refuſal, no contention can have exiſted. SECONDLY, the abſence of the defendant admits of two ſuppoſitions, namely, that (if preſent) he would either have *acknowledged* the claim, or *denied* it: if the *former*, the *Kâzee* muſt have paſſed a decree upon that ground; or, if the *latter*, upon teſtimony. Now decrees paſſed on thoſe different grounds are of a diſtinct nature, ſince that which is founded on teſtimony is binding on all men, whereas the other is not.—Where, therefore, the defendant is abſent, it becomes a matter of doubt with the *Kâzee* what kind of decree he ought to paſs; and hence it is requiſite that he ſuſpend it until the arrival of the defendant, when the nature of the decree he ought to paſs will be aſcertained.

nor againſt one who firſt oppoſes the [illegible] pears.

IF a defendant, having firſt denied the claim, ſhould afterwards diſappear, in that caſe alſo the *Kâzee* muſt ſuſpend his proceedings during his abſence, becauſe it is requiſite that the denial exiſt *at the time of paſſing the decree*, which is not the caſe in the preſent inſtance.—The opinion of *Aboo Yooſaf*, on this caſe, is different.—It is to be obſerved that the *repreſentative* of an abſentee is either one appointed by himſelf to act for him, (ſuch as an *agent*,) or one appointed by LAW, (ſuch as an executor nominated by the *Kâzee*,) or, laſtly, one who ſtands as *virtual* repreſentative, by the claim which the plaintiff prefers againſt the abſentee being alſo a cauſe of claim againſt ſome perſon preſent. This laſt may occur in various modes; and the following may ſerve for an example.—A perſon eſtabliſhes, by teſtimony, his right to a houſe in the poſſeſſion of a particular perſon, in virtue of his having purchaſed it from an abſentee, who was at that time the proprietor of it, and from whom the preſent poſſeſſor has uſurped it;—in which caſe, if the poſſeſſor deny all this, and the plaintiff eſtabliſh it by evidence, the *Kâzee* may paſs a decree relating both to the abſentee and the perſon preſent; nor would the denial of the ſale by the abſentee, if he ſhould afterwards return, be credited, becauſe the purchaſe of the houſe from its proprietor is the cauſe of that which the plaintiff claims from the perſon preſent, namely, the right of property in the houſe. In ſuch caſe, therefore, the perſon preſent ſtands as the agent for the abſentee, and his denial is conſequently equivalent to that of the abſentee.—The ground of this is that the plaintiff is not capable of proving his claim againſt the perſon preſent, unleſs he firſt eſtabliſh it againſt the abſentee. The perſon preſent is therefore conſidered as the repreſentative of the abſentee; and hence the decree of the *Kâzee* againſt the perſon preſent ſtands as a decree againſt the abſentee.—Where, however, the claim of the plaintiff upon the abſentee is the condition of ſomething which he claims againſt the perſon preſent, the latter is not in that caſe conſidered as the repreſentative of the abſentee. A full diſcuſſion of this is to be found in the *Jâma*.

The may lend the property of orphans.

IT is lawful for a *Kâzee* to lend the property of orphans, keeping a record of it in writing; becauſe ſuch loan is advantageous for the orphans, ſince it tends to preſerve and ſecure their property; and the *Kâzee* has the power of enforcing the reſtitution of it.—An *executor*, on the contrary, is reſponſible for the property he lends, as is alſo a *father*, becauſe neither of them has the power of enforcing a reſtitution of it.

CHAP. III.

Of Arbitration*.

An arbitrator muſt poſſeſs the qualities eſſential to a *Kâzee.*

If two perſons appoint an arbitrator †, and expreſs their ſatisfaction with the award pronounced by him, ſuch award is valid; becauſe, as theſe perſons have a power with reſpect to themſelves, they conſequently poſſeſs a right to appoint an arbitrator between them, and his award is therefore binding upon them.—This is where the perſon ſo appointed poſſeſſes the qualifications of a *Kâzee*; for as he ſtands in that relation to the other two, it is therefore requiſite that he be competent to diſcharge the function of a *Kâzee.*

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infant:

It is not lawful to appoint a ſlave, or an infidel, or a perſon that has been puniſhed for ſlander, or an infant, to act as an arbitrator; becauſe none of theſe is competent to be a witneſs.

but he may

If an unjuſt man be appointed an arbitrator, it is valid, becauſe of the validity of his appointment to the office of *Kâzee*, as has been already explained.

Either party may retract from the ar-
be-
award.

If two men appoint another an arbitrator, ſtill it is lawful for either of them to recede before he gives his award, becauſe as the arbitrator has received his powers from them, he cannot exert thoſe powers without their conſent. The award, however, when given, is binding upon them, as the power of the arbitrator over them was eſtabliſhed by their own agreement.

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* Arab. *Tahkeem.* † Arab. *Hakam.*

On a refer-

award, if approved.

IF the parties refer the award of the arbitrator to the *Kâzee*, and it be conformable to his opinion, he muſt cauſe it to be carried into execution, becauſe it would be uſeleſs to annul it, and then paſs a ſimilar decree.—But if it be contrary to his opinion, he muſt annul it, as the award of an arbitrator is not binding on the *Kâzee*, ſince he did not authorize it.

Reference to an arbitrator is invalid in caſes of

or retaliation.

THE appointment of an arbitrator is not valid in caſes where puniſhment or retaliation is incurred, becauſe the party has no power over his own blood, and is therefore not capable of aſſigning it to others. Lawyers have obſerved that the particular exception of retaliation and puniſhment affords an argument of the legality of arbitration in all other conteſted queſtions, ſuch as divorce, marriage, and the like. This is approved. Still, however, there is a neceſſity for a ratification of the award in theſe caſes by a decree of the *Kâzee*, in order that a controul being maintained over mankind, their preſumption may be reſtrained, for otherwiſe men would continually ſettle their differences by a private reference, without regard to the LAW.

An arbitrator's award of a fine againſt the *tribe* of an offender is of r

knowledge the offence.

IF, in a caſe of homicide from error, the ſlayer and the heir of the deceaſed appoint an arbitrator, and he award a fine of blood to be paid by the tribe of the ſlayer, ſuch award is of no effect; in other words, the heir is not entitled to exact ſuch fine from the tribe in virtue of the award, for it has no force over them, as they did not authorize the arbitrator.—If, alſo, the arbitrator award the fine to be paid by the *ſlayer*, the *Kâzee* muſt annul it, as being contrary to the LAW, which preſcribes the fine to be paid by the tribe;—excepting, however, where the fact is proved by the confeſſion of the ſlayer; for in that caſe the tribe are not liable to the fine.

He i amine witneſſes.

An arbitrator is empowered to hear the witneſſes of the plaintiff, and alſo to paſs an award upon the denial or acknowledgment of the parties, becauſe this is agreeable to the LAW.

The parties, acknowledging an arbitrator's decree, cannot afterwards retract from it.

IF an arbitrator give information to the *Kâzee* of the acknowledgement of one of the parties, or of the integrity of the witneſſes, at a time when both the parties continue to adhere to his award, ſuch information muſt be credited, and the *Kâzee* muſt not afterwards credit the denial of either of the parties, as the arbitrator's authority ſtill continues unſhaken.—If, on the other hand, he give information to the *Kâzee* relative to his *award*,—(that is, if the parties diſpute concerning his award,—one of them ſaying that "it was to *ſuch* or *ſuch* "effect," and the other denying this, and the arbitrator inform the *Kâzee* that "he has awarded *ſo and ſo*,")—his information muſt not be credited, ſince in ſuch caſe his authority no longer endures.

Any award [illegible] rent, child, or wife, is null.

THE determination of every perſon acting in the capacity of a judge (whether he be a *Kâzee* or an *arbitrator*) in favour of his father, his mother, his child, or his wife, is null and void, becauſe evidence in favour of any of theſe relations being unlawful on account of the ſuſpicion which it ſuggeſts, a determination in their favour is alſo unlawful, for the ſame reaſon.—A determination, however, *againſt* any of theſe relations is valid, becauſe evidence againſt them is accepted, ſince it is liable to no ſuſpicion.

Joint arbitrators muſt act conjunctively.

IF two perſons be appointed arbitrators, it is incumbent upon them to act conjunctively in giving a determination, as this is a matter which requires wiſdom and judgment.

SECTION.

SECTION.

Miscellaneous Cases *relative to* Judicial Decisions.

No act can be performed, with reſpect to the under ſtory of a houſe, which may any way affect the building.

In a houſe, of which the upper ſtory belongs to one man, and the under ſtory to another, the proprietor of the under ſtory is not entitled to drive in a nail, or to make a window, without the permiſſion of the proprietor of the upper ſtory.—This is the doctrine of *Haneefa*. The two diſciples hold that the proprietor of the under ſtory may do any act whatever with reſpect to it, provided no injury reſult to the upper ſtory. The ſame diſagreement alſo ſubſiſts with regard to the proprietor of the upper ſtory building upon that foundation. Some of our lawyers remark that the doctrine aſcribed to the two diſciples is only an explanation of that of *Haneefa*, and that, in reality, there exiſts no diſagreement between them.—Others again ſay that, according to the two diſciples, there is a perfect freedom;—in other words, either of the proprietors is at full liberty to do whatever act he pleaſes with relation to his property; for *property*, in its very nature, implies a perfect freedom with regard to it, reſtrictions upon it being merely ſupervenient, and fixed in order to prevent any detriment to another. Hence if the detriment be only *doubtful*, and not *inevitable*, the proprietor cannot lawfully be reſtrained from acting upon his own property. According to *Haneefa*, on the other hand, there is a reſtriction;—in other words, neither of the proprietors is permitted to do any acts with regard to their reſpective property without the permiſſion of the other, becauſe ſuch acts affect a place with which the right of another is connected, and that right is ſacred from any act of his, in the ſame manner as the right of a mortgager or a leſſee.—Beſides, the freedom and abſoluteneſs of the property to its owner is here ſupervenient, ſince it depends on the conſent of another: ſo long, therefore, as that conſent is doubtful, the original reſtriction operates. In theſe caſes, moreover, the detriment is not *eventual*, but is in ſome degree *certain*; ſince the driving in of a nail or wedge, or the breaking of the wall to make a window, tends to weaken the edifice, whence theſe acts are prohibited.

A paſſage cannot be made into a private lane.

If there be a long lane, parallel to which, either on the right or left, runs another long lane, not a thoroughfare, (that is, not open at both ends,) it is not permitted to any of the inhabitants of the firſt lane to make a door to open into the ſecond lane; becauſe the object of making a door is to obtain a paſſage to and fro; and the ſecond lane is not free to the inhabitants of the firſt, ſince not being a thoroughfare, the right of paſſage through it belongs only to the inhabitants of it.—Some have ſaid that it is perfectly lawful for any of the inhabitants of the firſt lane to open a door into the ſecond; becauſe the opening of a door is nothing more than the breaking of a wall by its proprietor, which is lawful; but that the prohibition againſt paſſing to and fro nevertheleſs remains in force. The authentic doctrine however is, that the opening of a door, in ſuch caſe, is unlawful; becauſe after the door is opened it will be difficult to prevent a continual thoroughfare; and alſo, becauſe there is a poſſibility that after ſome time the right of paſſage might be claimed by the perſon who made the door, and the very circumſtance of the door might be pleaded as a proof of his right. If, however, the ſecond lane be not *long*, but *ſhort*, the inhabitants of the firſt lane have a right to open doors into it; becauſe they have a right of paſſage through it, ſince on account of its ſhortneſs it is conſidered as a *court*, in which all have a right of participating, whence it is that they have all an equal claim of *Shaffa* in caſe of the ſale of any of the houſes in it.

An indefinite

If a perſon vaguely claim ſomething belonging to a houſe, and the proprietor of the houſe deny his right to any thing, but afterwards compound with him for his claim, ſuch compoſition is valid; for although the article in diſpute was not known, yet a compoſition with a *known* article for one that is *un*known is lawful; according to our doctors, ſince as the article compounded for merely *drops*, the uncertainty concerning it can never create ſtrife;—for uncertainty, in a matter which *drops*, leaves no room for contention, as this cannot occur but in caſes of uncertainty reſpecting things the delivery of which is required.

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IF a perſon claim a houſe in the poſſeſſion of another, on the plea that "the poſſeſſor had, at a former period, made a *gift* of it to him," and upon being required to produce evidence, ſhould then ſay "he "denied the gift, and I therefore bought the houſe from him," and produce witneſſes, and they atteſt the purchaſe, but ſtate the date of it to be antecedent to the gift, ſuch teſtimony is not admiſſible, becauſe of its differing from the aſſertion of the claimant with reſpect to the date of the deeds;—whereas, if they were to atteſt the purchaſe as having been made *poſterior* to the gift, their teſtimony would in that caſe be admitted, becauſe of its conformity to the claimant's plea. If, on the other hand, he plead a gift, and then bring witneſſes to prove the purchaſe previous to the gift, without mentioning the denial of the gift by the donor, in this inſtance alſo the evidence is not admiſſible.—This is mentioned in various copies of the *Jama Sagheer*; and the reaſon of it is that the claim of the houſe, in virtue of a gift, is an acknowledgment of its being the property of the giver; but from which the claimant afterwards recedes by declaring that he had purchaſed it prior to the gift, which is a contradiction.—It is otherwiſe in the former caſe; for there the purchaſe is declared to be *poſterior* to the gift; and a declaration to this effect, ſo far from *denying* the property to have exiſted in the donor at the time of the gift, is rather a *confirmation* of it.

If the purchaſe of a fe- [illegible] the maſter may cohabit with her.

If a perſon poſſeſſed of a female ſlave ſay to another "you pur-"chaſed this ſlave from me, and have not paid me the price," and determine in his own mind to drop the ſuit, and of conſequence refrain from any further contention with the other, he may then lawfully cohabit with her, ſince the denial of the purchaſer annuls the ſale in the ſame manner as where both parties deny it.

Objection.—How can the ſale be annulled by the mere determination of the ſeller in his own mind to relinquiſh the ſuit, ſince no contracts can be annulled by the mere determination to annul them; whence it is that, in a ſale with an option, if the poſſeſſor of the option determine to annul it, ſtill the annulment does not take place immediately on the forming of ſuch reſolution?

Reply.—In the caſe in queſtion the ſale does not become null merely by the determination, but becauſe of the determination being joined to a conduct that manifeſts it, ſuch as the detention of the ſlave in the proprietor's poſſeſſion, his carrying her away from the place of contention to his own houſe, and his uſing her as a ſervant.

In the receipt [illegible] the *receiver* muſt be credited with re- [illegible] the

If a perſon acknowledge that he had received ten *dirms* from another, but afterwards aſſert that they were *Zeyf*, or *bad*, in that caſe his declaration muſt be credited; becauſe bad *dirms*, although of an inferior value, are nevertheleſs of the ſpecies of *dirms*, whence if, in a *Sirf* ſale, a perſon take poſſeſſion of *bad* ones in exchange for *good*, it is valid. As, moreover, a receipt of *dirms* is not reſtricted to *good* ones, it does not follow, from his acknowledgment of the ſeizin, that the *dirms* were good; and ſuch being the caſe, his declaration muſt be credited, becauſe he denies the receipt of good *dirms*, which is his right.—It would be otherwiſe if he were to declare that "he had "received ten *good* DIRMS," or that "he had received his *right*," or "the price of his wares," or "a diſcharge of his claims," and afterwards to allege that the *dirms* were *bad*; for in neither of theſe caſes would his declaration be credited; becauſe in the firſt caſe he expreſsly acknowledges the receipt of good *dirms*; and in the three following he makes ſuch acknowledgment by implication, and therefore his ſubſequent declaration to the contrary, being conſidered as a prevarication, is not credited *.

A creditor denying his debtor's acknowledgement cannot afterwards ſubſtantiate his claim but by proof, or the debtor's verification.

IF one perſon ſay to another " I owe you one thouſand *dirms*," and the other reply " you do not owe me any thing," but afterwards, in the ſame meeting, ſay " you owe me one thouſand *dirms*," in that caſe he is not entitled to any thing unleſs he adduce proof, or the debtor verify his aſſertion; becauſe the debtor's acknowledgment was virtually annulled by his denial; and his ſubſequent aſſertion of courſe becomes a claim *de novo*, which therefore requires either to be proved, or to be verified by the debtor. It is otherwiſe where a perſon ſays to another " you bought certain goods from me," and that other denies; for he might nevertheleſs afterwards, without prevarication, confirm the declaration of the perſon in queſtion in the ſame meeting; becauſe in a contract of ſale one of the parties only cannot annul it; in the ſame manner as one of them is incapable of making it.—The reaſon of this is that the acknowledgment of a contract of ſale is the right of the buyer and ſeller jointly, and therefore the contract is not annulled by the denial of the purchaſer only: the confirmation of the purchaſer, therefore, after his denial, is valid, ſince his denial did not occaſion an annulment.—A perſon, on the contrary, in whoſe favour an acknowledgment is made, may of himſelf annul ſuch acknowledgment by a rejection of it; and his ſubſequent aſſertion correſponding with the acknowledgment is not a corroboration of it, becauſe the acknowledgment did not then exiſt, it having been virtually done away by his rejection of it.—Hence the ſubſequent aſſertion is a claim *de novo*, which conſequently requires either proof by witneſſes, or the verification of the debtor.

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* Here follows an account of the different gradations of *dirms* from good to bad, which is omitted in the tranſlation, as it will hereafter be fully explained in its proper place.

In a claim for debt, the evidence of the debtor, proving a diſcharge, muſt be credited.

If a perſon make a claim upon another, and that other declare that he never owed him any thing, and the plaintiff prove, by witneſſes, that the defendant owes him one thouſand *dirms*, and the defendant, on the other hand, prove by witneſſes that he has paid the ſame, in that caſe the evidence of the defendant muſt be credited: and in the ſame manner alſo, the evidence of the defendant muſt be credited, in caſe it tend to eſtabliſh his having obtained a releaſement or diſcharge of the claim.—*Ziffer* maintains that the evidence of the defendant muſt not be credited, ſince payment is a branch of obligation, and the defendant having denied the exiſtence of the obligation at any period, is therefore evidently guilty of prevarication. Our doctors, on the other hand, argue that a conſiſtency with regard to the denial and the proof is here poſſible, becauſe unjuſt debts are ſometimes paid to avoid litigation, and releaſements from them are likewiſe ſometimes given. Sometimes, alſo, a defendant, after denying the validity of the claim, compounds with the plaintiff; and in ſuch caſe he is bound to pay the compoſition, notwithſtanding the debt for which it was made may have been unjuſt.—If the defendant declare, "I owe you *nothing*," in that caſe alſo his evidence, to the effect above recited, is creditable, becauſe of its perfect conformity with the aſſertion that "he owes him *nothing*," which evidently means *at that time*, in as much as he proves that he had afterwards paid it to him.—But if he were to ſay "I never owed you any thing, and I do not "know you,"—the evidence he might afterwards produce of his having paid the debt, or of his having obtained a releaſement from it, would not be credited; becauſe the contradiction between his aſſertion and the evidence cannot in this caſe be reconciled, ſince no man enters into the buſineſs of giving or receiving with one of whom he has no knowledge.—*Kadooree* remarks that in this caſe alſo the evidence muſt be credited, becauſe the contradiction that ſubſiſts is not wholly irreconcileable, in as much as women who are kept concealed often tranſact buſineſs mediately through others, without knowing the perſon with whom the buſineſs is concluded; and it alſo often happens that men of rank, when a mob aſſemble at their door and make a noiſe, deſire their agents to give them ſome money to pacify them.

**Caſe of a diſ-
puted pur-
chaſe of a de-**

IF a perſon declare that "he has purchaſed a female ſlave from "another," and that other deny that he had ever ſold her to him, and the purchaſer having proved his aſſertion by witneſſes, an additional finger be diſcovered on the hand of the ſlave, and the ſeller prove by evidence that the purchaſer had exempted him from reſponſibility for every defect, in that caſe the teſtimony of the ſeller muſt be rejected, ſince he is evidently guilty of prevarication. This is the doctrine of the *Záhir Rawáyet.* It is related, as an opinion of *Aboo Yooſaf*, that the evidence of the ſeller muſt be credited, becauſe of the analogy of this caſe to that of debt, as before explained, in which it was ſhewn that there was a poſſibility of reconciling the contradiction; for a reconcilement of the contradiction is alſo poſſible in this caſe, by ſuppoſing the ſeller to have been an agent for another, on which ſuppoſition the declaration of the proprietor, that "he had not ſold the "ſlave," would have been true, and his ſubſequent plea, of having been exempted from a reſponſibility for defects, would alſo have been valid. Thus the apparent contradiction is capable of reconcilement. The ground on which the *Záhir Rawáyet* proceeds is, that the plea of having been exempted from a warranty againſt defects is an acknowledgment of the exiſtence of the ſale, which he had before denied, and hence it neceſſarily follows that he prevaricated.—It is otherwiſe in the caſe of debt, for in that caſe the payment is no argument of the reſpondent's acknowledging the exiſtence of it, ſince (as has been before explained) unjuſt debts are often paid to avoid ſtrife.

A deed ſuſpended, in its effect, upon the will of God, is null.

If a perſon, having acknowledged a debt to another, ſhould ſubſcribe a deed to that effect, and at the concluſion of it inſert the following ſentence, "Whoſoever produces this deed of acknowledgement, and claims the thing recited therein, is proprietor thereof, "if it pleaſe God,"—or, if a perſon, having ſold ſomething to another, ſhould at the end of the bill of ſale inſert the following ſentence, "If any perſon ſhall hereafter claim the property of the ſubject of the ſale, in that caſe I am anſwerable for the ſame, if it "pleaſe God,"—in both theſe caſes the deeds are of no effect; whence, in the firſt caſe, the acknowledgment is null, and in the ſecond, the ſale is invalid. The two diſciples hold that in the former caſe the debt is binding, and in the latter caſe the ſale is valid; becauſe in their opinion the condition "if it pleaſe God" applies, not to the general purport of the deed, but merely (in the former inſtance) to the expreſſion "Whoever produces this deed of acknowledgment," and ſo forth,—or (in the latter) to the expreſſion "If "any perſon ſhall hereafter claim," and ſo forth; becauſe the deſign, in drawing up deeds of acknowledgment and of ſale is merely to corroborate and confirm the act; and if the expreſſion in queſtion had a reference to the whole deed, this deſign would be defeated. *Haneefa*, on the contrary, being of opinion that this condition applies to *the whole* of the deed, therefore holds it to be invalid *.—It is to be obſerved that if a blank be left at the end of a bill of ſale or deed of acknowledgment, and the words "*if it pleaſe* God" be afterwards written, our lawyers are of opinion that the clauſe does not affect the bill or the deed, becauſe the blank, in either caſe, marks the concluſion.

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* The arguments both of the two diſciples and of *Haneefa* are more fully detailed in the original; but as they relate to principles proper to the *Arabic* language, the tranſlator has given only the *ſubſtance* of them.

CHAP. IV.

Of the Decrees of a *Kázee* relative to Inheritance.

Caſe of the widow of a *Chriſtian* claiming her inheritance after having embraced the faith.

IF a chriſtian die, and his widow appear before the *Kázee* as a *Muſſlimá*, and declare that "ſhe had become ſo *ſince* the death of her huſband," and the heirs declare that ſhe had become ſo *before* his death, their declaration muſt be credited. *Ziffer* is of opinion that the declaration of the widow muſt be credited; becauſe the change of her religion, as being a *ſupervenient* circumſtance, muſt be referred to the neareſt poſſible period. The arguments of our doctors are, that as the *cauſe* of her excluſion from inheritance, founded on difference of faith, exiſts in the preſent, it muſt therefore be conſidered as extant in the preterite, from the argument of the preſent;—in the ſame manner as an argument is derived from the preſent, in a caſe relative to the running of the water courſe of a mill;—that is to ſay, if a diſpute ariſe between the leſſor and leſſee of a water-mill, the former aſſerting that the ſtream had run from the period of the leaſe till the preſent without interruption, and the latter denying this, in that caſe, if the ſtream be running at the period of contention, the aſſertion of the *leſſor* muſt be credited, but if otherwiſe, that of the *leſſee.* As, moreover, an argument drawn from apparent circumſtances is proof ſufficient to ſet aſide the claim of a plaintiff, it follows that the argument in queſtion ſuffices, on behalf of the heirs, to defeat the plea of the widow.—With reſpect to what *Ziffer* objects, it is to be obſerved that he has regard to the argument of apparent circumſtances, for eſtabliſhing the claim of the wife upon her huſband's eſtate, and an argument of this nature does not ſuffice as proof to *eſtabliſh* a right although it would ſuffice to *annul* one.

Caſe of the *Chriſtian* widow of a *Muſſulman* claiming, under the ſame circumſtance.

If a *Muſſulman*, whoſe wife was once a Chriſtian, ſhould die, and the widow appear before the *Kázee* as a *Muſſlimá*, and declare that ſhe had embraced the faith *prior* to the death of her huſband, and the heirs aſſert the contrary,—in this caſe alſo the aſſertion of the heirs muſt be credited, for no regard is paid, in this inſtance, to any argument derived from preſent circumſtances, (as in the caſe of the water-mill,) ſince ſuch an argument is not capable of eſtabliſhing a claim, and the widow is here the claimant of her huſband's property. With reſpect to the heirs, on the contrary, they are repellants of the claim; and probability is an argument in their favour, ſince the *Iſlamiſm* of the widow is ſupervenient, and is therefore an argument againſt her.

A truſtee, on the deceaſe of his principal, muſt pay the depoſit to whomſoever he acknowledges as *heir*.

If a perſon who had depoſited four thouſand *dirms* in the hands of another ſhould die, and the truſtee acknowledge a certain perſon to be the ſon of the deceaſed, and his true and only heir, he is bound to pay to that perſon the four thouſand *dirms* which he held in truſt; becauſe in this caſe he makes an acknowledgment that what he retains in truſt is the right of the heir, and conſequently it is the ſame as if, during the life of the perſon from whom he received the depoſit, he had acknowledged that it was his right. It is otherwiſe where a truſtee makes an acknowledgment that a certain perſon has been appointed an *agent for ſeizin* by the proprietor, or that ſuch an one has *purchaſed* the depoſit from the proprietor; for in that caſe he could not be deſired to deliver up the depoſit, becauſe this acknowledgment proves the actual exiſtence of the depoſitor, ſince it ſhews him to be ſtill living. His acknowledgment, therefore, of the agency or the purchaſe, is an acknowledgment affecting the property of another: but this cannot be objected to an acknowledgment made by a truſtee after the death of the proprietor, for upon that event the property devolves upon the heirs.—

It is otherwiſe where a debtor acknowledges that a certain perſon has been appointed agent for ſeizin by his creditor; for the acknowledgement here relates to his own property, in as much as he pays the debt by means of his own property, and the agent receives the ſame; and hence, after ſuch acknowledgment, he becomes bound to pay it.—If the truſtee, after making an acknowledgment in favour of the ſon and heir, in the manner above related, ſhould again make an acknowledgment in favour of another ſon, and the one firſt acknowledged deny the ſame, in that caſe he [the truſtee] is bound to pay the whole to that one; becauſe after ſuch acknowledgment became binding (in the manner already explained) his tenure of the property was no longer valid; and hence his ſubſequent acknowledgment in favour of the other ſon is an acknowledgment with reſpect to the abſolute property of the firſt ſon, and is conſequently invalid,—in the ſame manner as holds where the firſt ſon is notorious;—and alſo, becauſe, as at the time when he [the truſtee] made the acknowledgment in favour of the firſt ſon, no other ſon appeared to aſſert his right, the acknowledgment was therefore valid; but as the firſt ſon is preſent to deny the acknowledgment afterwards made in favour of the ſecond ſon, that acknowledgment is therefore invalid.

In the diviſion of an eſtate, the *Kâzee* muſt not demand any ſecurity from the heirs or creditors in behalf of thoſe who may be abſen

WHEN a diviſion is made of the effects of a deceaſed perſon between his heirs and creditors, the *Kâzee* muſt not require ſecurity either from the heirs or the creditors, as a precaution in caſe of the appearance of more heirs or more creditors, for this would be oppreſſion, as being a deviation from common practice. This is according to *Haneefa*. The two diſciples maintain that he muſt require ſecurity.—This diſagreement relates to a caſe where the debt of the creditors and the right of inheritance is proved by evidence, and where they ſeverally declare that they know of no other debtors or heirs than themſelves.—The reaſoning adduced by the two diſciples in ſupport of their opinion is, that the *Kâzee* is the conſervator of the rights of the abſent; and it is moſt probable that ſome of the creditors or heirs may be abſent, ſince death is often ſudden, and may happen at a time when they are not all preſent; and as the taking of ſecurity is on this account an adviſeable precaution, the *Kâzee* muſt therefore take this precaution, in the ſame manner as he exacts ſecurity when he delivers a trove, or a fugitive ſlave, to the owner, or when he awards maintenance to a wife from the eſtate of her abſent huſband. The arguments of *Haneefa* upon this point are twofold.—FIRST, the right of thoſe that are preſent is eſtabliſhed with certainty in caſe of there being no abſent heirs, and is *apparently* eſtabliſhed in the mean time, even if there be abſent heirs; and as it is incumbent on the *Kâzee* to act according to what is *apparent* to him, he muſt not ſuſpend his proceedings in favour of thoſe that are preſent, by exacting ſecurity for the rights of the abſent, whoſe actual exiſtence is uncertain;—in the ſame manner as where a perſon eſtabliſhes the *purchaſe* of any thing in the hands of another,—or a debt due to him by a ſlave; that is, if a perſon prove a right by purchaſe to a thing in the poſſeſſion of another, it is the duty of the *Kâzee* immediately to order it to be delivered to him without exacting ſecurity, although another may eventually appear and claim it in virtue of a prior purchaſe;—and in the ſame manner, if a perſon prove a debt due to him by a ſlave, the *Kâzee* muſt order the ſlave to be ſold, to the end that payment may be made from the price, without exacting any ſecurity, although there be a poſſibility of another creditor afterwards appearing.—SECONDLY, the principal is unknown, and ſecurity is invalid if the principal be not clearly pointed out,—as where, for inſtance, a perſon ſays to ſeveral debtors " I am bail for *one* of you," in which caſe the ſecurity is invalid, becauſe the actual principal is not ſignified, notwithſtanding there be a certainty of his exiſtence. In the caſe in queſtion, therefore, the ſecurity is invalid *a fortiori*, ſince even the *exiſtence* of the principal is uncertain.—It is otherwiſe in the caſe of decreeing maintenance to the wife of an abſentee from the effects of her huſband, becauſe her right being known and eſtabliſhed, the perſon in favour of whom the ſecurity is given is not uncertain.—With reſpect

ſpect to the caſe of a fugitive ſlave, or a trove property, there are two traditions.—Concerning thoſe, however, there is alſo a difference of opinion.—Some have ſaid that if the *Kázee* give a trove property to the proprietor, on his deſcribing the marks, or a fugitive ſlave to his maſter, on the acknowledgment of the ſlave that "the ſaid perſon is his maſter," it is incumbent upon him, in either caſe, to take ſecurity.—And all our doctors coincide in this opinion; becauſe the right of the receiver is not proved, whence it is in the power of the *Kázee*, if he pleaſe, to withhold the ſlave from the perſon in queſtion altogether.

In the joint inheritance of a property held by a *third* perſon, the preſent heir receives his ſhare; but r[illegible] r[illegible] behalf of him who is abſent.

If a perſon prove, by evidence, that a houſe then in the poſſeſſion of another had been left between him and his brother, who is abſent, in that caſe one half of the houſe muſt be given to him, and the other half left in the hands of the perſon who has poſſeſſion; and no ſecurity muſt be exacted from him.—This is according to *Haneefa.*—The two diſciples are of opinion that if the poſſeſſor deny the right, the ſhare of the abſent brother muſt be put into the hands of a truſtee until his return; but if he acknowledge the right, it muſt then be left in his poſſeſſion;—for they argue that a *denier*, as being an *opponent*, cannot be truſted with the property; whereas it may be entruſted to an *acknowledger*, as he is a friend and confident.—The argument of *Haneefa* is that the decree of the *Kázee*, awarding that "the deceaſed left "the houſe to his heirs," is a decree merely in favour of the *deceaſed*; for inheritance cannot take place unleſs the property of the perſon through whom it devolves be proved; and as there is a probability of the deceaſed having conſtituted the poſſeſſor truſtee, it follows that the houſe cannot be taken from him; as holds in the caſe of his acknowledging it.—In regard to his *denial*, it is virtually annulled by the decree of the *Kázee*; and there is a probability of his not denying the right again, becauſe the diſpute in queſtion has become known both to himſelf and the *Kázee*.—If the claim, in the caſe in queſtion, relate to *moveable* property, ſome have ſaid that the article is to be taken from the poſſeſſor, according to all our doctors; becauſe there is a neceſſity for the conſervation of it; and this is anſwered in the beſt manner by the taking of it from the poſſeſſor, who, on account of his denial of the right of the other, may convert it to his own uſe, either from oppoſition, or from a belief of its being his own right: but when the *Kâzee* takes it from him, and depoſits it with a truſtee, the probability is that the truſtee, from his integrity, will take care of it. The caſe is different with reſpect to immoveable property, for that is preſerved in itſelf; whence it is that an executor, although he have power to ſell the *moveables* of an abſent heir, arrived at the age of maturity, yet cannot do ſo with regard to his *immoveable* property.—Others, however, have ſaid that the ſame difference of opinion ſubſiſts with regard to *moveable* as obtains with reſpect to *immoveable* property.—It is to be obſerved that the opinion of *Haneefa*, that the half ought to be left in the hands of the poſſeſſor, is the moſt authentic, becauſe there is a neceſſity for conſervation, and this is anſwered in the beſt poſſible manner by putting it in the hands of one who is reſponſible in caſe of its loſs, ſince it is likely that he will be moſt careful of it.—The poſſeſſor, moreover, is reſponſible in conſequence of his denial, whereas a truſtee is not.—With reſpect to what is further ſaid, that "no ſecurity muſt be exacted," it proceeds on this principle, that the exaction of bail is an occaſion of litigation and contention; and it is the duty of the *Kâzee* to prevent theſe,—not to excite them.—If, in the caſe in queſtion, the abſentee return, there is no neceſſity for again producing evidence, becauſe he is entitled to the half in virtue of the *Kâzee*'s decree in favour of the heir that was preſent; for any one of the heirs of a deceaſed perſon ſtands as litigant on the part of all the others, with reſpect to any thing due *to* or *by* the deceaſed, whether it be debt or ſubſtance; ſince the decree of the *Kâzee*, in ſuch caſe, is in reality either in favour of or againſt the deceaſed; and any one of the heirs may ſtand as his repreſentative with reſpect to ſuch decree.—It is otherwiſe with reſpect to taking poſſeſſion of the portion due to another from the eſtate of a perſon deceaſed; that is to ſay, a part of the heirs, although they be litigants on behalf of another heir, cannot, however, take poſſeſſion of his portion on his behalf, becauſe a perſon, in taking poſſeſſion, acts for himſelf, and is therefore incapable of acting in it, as agent, for another. Hence the perſon preſent is not entitled to receive any other portion than his own; in the ſame manner as where an heir claims a debt due to the deceaſed, and the *Kázee* paſſes a decree in his favour; in which caſe the heir, although he ſtood as litigant in behalf of the other heirs, is yet not entitled to receive their ſhares of the debt.

OBJECTION.—If one heir be litigant in behalf of the other, it would follow that each creditor is entitled to have recourſe to him for payment of his demand; whereas, according to law, each is only obliged to pay his *own* ſhare.

REPLY.—The creditors are entitled to have recourſe to one of ſeveral heirs only in a caſe where all the effects are in the hands of that heir. This is what is ſtated in the *Jama Kabeer*; and the reaſon of it is that although any one of the heirs may act as *plaintiff* in a cauſe on behalf of the others, yet he cannot act as *defendant* on their behalf, unleſs the whole of the effects be in his poſſeſſion.

An alms-gift of *Mal* includes

IF a perſon ſay, "I devote my *property* in alms to the diſtreſſed," in that caſe the word *property*, thus generally uſed, is conſtrued to mean that part of his property which is ſubject to *Zakát*; whereas, if a perſon ſay "I bequeath the third of my *property*," the term *property* is in that caſe conſtrued to apply to his property of every deſcription. This diſtinction is according to a favourable conſtruction.—Analogy would ſuggeſt, in the *former* inſtance alſo, that the *whole* property is underſtood; and this opinion has been followed by *Ziffer*; becauſe the term *property* [*Mál*] applies to and includes property of every deſcription, in a caſe of *alms-gift*, in the ſame manner as in a caſe of *bequeſt*. The reaſons for a more favourable conſtruction of the law in this particular are twofold.—FIRST, an obligation impoſed by a perſon upon himſelf is analogous to an obligation impoſed by God; in other words, if a perſon impoſe any obligation on himſelf, it is valid only with reſpect to thoſe articles concerning which God has impoſed obligations upon mankind: an obligation of *alms*, therefore, impoſed by a perſon upon himſelf, takes effect only with reſpect to ſuch property as God has impoſed alms upon.—Bequeſt, on the contrary, reſembles inheritance, as the legatee ſucceeds to the property of the deceaſed in the manner of an heir; and hence a bequeſt of *property* is not reſtricted to any *particular deſcription* of property.—Secondly, from his mode of expreſſion it is reaſonable to ſuppoſe that he undertakes to beſtow in alms that part of his property only which is ſuperfluous, and beyond the occaſion of his wants; and this is the part on which *Zakât* is impoſed. Bequeſt, on the contrary, as it takes place at a time when the teſtator is free from want, is conſidered as extending to the *whole* of his property.—It is to be obſerved that the ſpeaker's declaration "I devote my property in alms, &c." includes alſo his *Aſhooree* lands, according to *Aboo Yooſaf*, becauſe land of this deſcription is ſubject to the obligation of alms, agreeably to his tenets, that, in *tithe*, the conſideration of *alms* is predominant.—According to *Mohammed*, on the contrary, his *Aſhooree* land is not included, becauſe, agreeably to his tenets, the conſideration of *ſupport to the ſtate* is predominant in *tithe*.—His *Khirâjee*, or *tribute* lands, are however not included, according to all our doctors, becauſe tribute is deſigned purely as a ſupport to the ſtate, and *alms* are no conſideration in it.

Caſe of an

If a perſon ſay "I devote my *poſſeſſions* [*Milk*] in alms to the diſ-"treſſed," there is in that caſe a difference of opinion. Some have ſaid that this muſt be conſtrued to mean the *whole* of his property; becauſe the term here uſed [*Milk*] is of a more general nature than the term *Mâl* uſed in the former caſe:—the occaſion, moreover, of reſtricting the application, in that inſtance, to ſuch property as is ſubject to *Zakât*, is purely becauſe of *Mâl* being the term uſed on that occaſion in the Koran; and ſuch being the caſe, the term *Milk* muſt therefore be explained in its common acceptation. Others, again, have ſaid that the terms *Milk* and *Mâl* import the ſame thing in effect; and this is the better opinion; ſince both terms imply that part of his property which exceeds his wants, as was before mentioned; and that is the part of his property ſubject to *Zakât.*—If, however, a perſon have no other property beſides what he obliges himſelf to beſtow in alms, he muſt in that caſe reſerve a ſufficiency for his own ſubſiſtence, and beſtow the remainder; and afterwards, upon his acquiring more property, beſtow a part of it adequate to what he had before reſerved. With reſpect to a *ſufficiency for ſubſiſtence*, *Mohammed* has not determined the quantity, becauſe of the different conditions of men. Some have ſaid that a perſon is to reſerve only one day's ſubſiſtence, in caſe of his being an artificer or labourer; one month's ſubſiſtence, in caſe he poſſeſs houſes and ſhops let out upon leaſe; one year's ſubſiſtence, in caſe he poſſeſs immoveable property of lands; and ſo on,—in proportion to the length of time of receiving the income of his property;—and on this principle a *merchant* is to reſerve as much as may ſuffice till the probable return of his property.

The acts of an executor are valid without any formal notification of his appointment.

IF a perſon be appointed executor to another, and he be not informed of that circumſtance, but nevertheleſs ſell ſome part of the effects of the deceaſed, the appointment becomes confirmed, and the ſale is valid; whereas ſale by an agent, on the contrary, is not valid, unleſs he be informed of his agency.—This diſtinction is according to the *Zâhir Rawâyet. Aboo Yooſaf* is of opinion that the ſale by the executor is alſo invalid, becauſe an executor is, in fact, a perſon appointed to act as agent after the death of the teſtator, and muſt therefore be conſidered in the ſame light with an agent *before* death.—The reaſon of the diſtinction, as ſtated in the *Zâhir Rawâyet*, is that the office of an executor is to *repreſent*, not to act as *agent*; for it refers to a period when the appointment of agency would be null. The acts of an executor, therefore, do not reſt upon his knowledge of the teſtator's will any more than the acts of an heir;—in other words, if an heir were to ſell ſome part of the effects of the deceaſed, not knowing that he was dead, the ſale would be good; and ſo alſo of ſale by an executor.—*Agency*, on the contrary, is merely a delegation, ſince in the caſe of agency the power and authority of the conſtituent ſtill endure: the acts of an agent, therefore, reſt upon his knowledge of his appointment.—The ground of this is, that in reſting the acts of agents upon a knowledge of their appointments there is no injury to the conſtituent, ſince he is himſelf capable of performing ſuch acts; whereas, if the acts of an executor were ſuſpended on his knowledge of his appointment, an injury would reſult to his conſtituent, who is himſelf incapable of performing ſuch acts.

An agent's appointment [illegible] liſhed by a caſual information;

If a man appoint another his agent, and, a perſon having brought him intelligence of this*, he immediately, upon the receipt of it, perform ſome act, (ſuch as *ſale* for inſtance,) in that caſe the act is valid, whether the informant be free or a ſlave, of mature age or otherwiſe, an unjuſt or juſt man; becauſe a ſimple information of his appointment eſtabliſhes his right to act, although it be no way *binding* upon him.

but his diſmiſſion cannot be eſtabliſhed [illegible]

The diſmiſſion of an agent is not eſtabliſhed until it be atteſted to the agent by two perſons of unknown character, or by one juſt man. This is the doctrine of *Haneefa*. The two diſciples have ſaid that the law, in this caſe, is the ſame as in the preceding; for as the diſmiſſion and appointment of agents are concerns of frequent occurrency, the notification of one perſon is therefore ſufficient. The arguments of *Haneefa* are that the ſimple notification of diſmiſſion is binding, as being a cauſe of the agent's deſiſting from action, and inducing reſponſibility for the property in his poſſeſſion. The notification in queſtion, therefore, is in one ſhape evidence, and conſequently requires one of the two conditions of evidence, namely *number* [of the witneſſes] or *integrity*; in other words, it requires to be atteſted by one juſt perſon, or by *two* perſons of unknown character. It is otherwiſe with reſpect to the ratification of an *appointment* of agency, ſince that is no way binding, as has been already mentioned.—It is alſo otherwiſe where the diſmiſſion is notified by a *meſſenger* from the conſtituent, becauſe the word of a meſſage-bearer is equivalent to that of the *ſender* of it, from neceſſity, and in that caſe, therefore, the atteſtation of one juſt man or two unknown men is not required.—The ſame difference of opinion obtains in caſes of information conveyed to a maſter of the crime of his ſlave,—to the *Shafee* of the ſale of a houſe,—to a virgin of her marriage,—or to *Muſſulman* converts in a hoſtile country, who have not yet taken refuge in the *Muſſulman* territory, of particular ordinances in regard to religion. Thus if an unjuſt perſon inform a maſter that a particular ſlave belonging to him had committed a crime, and the maſter afterwards ſell or emancipate the ſaid ſlave, it is not in that caſe incumbent upon him to pay the atonement, unleſs the notification of the crime be atteſted by one juſt man, or by two men of unknown character, according to *Haneefa:* contrary to the opinion of the two diſciples.—In the ſame manner alſo, if an unjuſt perſon notify the ſale of a houſe to the *Shafee*, or perſon having the right of pre-emption over it, and the *Shafee* ſhould not thereupon put in his claim of *Shaffa*, ſtill, according to *Haneefa*, his right is not avoided; whereas, according to the two diſciples, it is forfeited. So alſo, if an unjuſt perſon notify her marriage to a virgin, and ſhe thereupon remain ſilent, ſuch ſilence, according to *Haneefa*, is not an aſſent; but according to the two diſciples it is.—So likewiſe, if an unjuſt man inform an abſent *Muſſulman* of new ordinances in reſpect to religion, and he ſhould not conform accordingly, *Haneefa* holds that he is not in that caſe guilty of any offence; whereas the two diſciples are of opinion that he is.

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* By *a perſon* is here to be underſtood a perſon not deputed by the conſtituent, but one who having caſually heard of the appointment brings information of it to the agent.

not liable for any loſs which may be incurred to the prejudice of another in creditors.

If a *Kázee*, or *Ameen* appointed by him, ſell the ſlave of a certain perſon, in order to diſcharge the demands of his creditors, and the money, after the receipt, be loſt or deſtroyed in the hands of the *Kâzee*, or his *Ameen*, and the ſlave be then proved to have been the property of ſome other perſon, in that caſe neither the *Kázee* nor his *Ameen* is reſponſible for the loſs; becauſe if *Kázees* were ſubject to ſuch reſponſibility, no one would accept of the appointment; and the rights of the people would conſequently be deſtroyed.—The *Kâzee*, therefore, not being reſponſible for the loſs, the purchaſer is entitled to an indemnification from the creditors on whoſe account the ſale was made, becauſe of the impracticability of his being indemnified by the party with whom he made the bargain.—In the ſame manner as where an incapable infant* or an inhibited ſlave appoints an agent for ſale, who accordingly ſells ſomething on his behalf, and, the price being loſt after he had received it, a right to the thing ſold is proved by another; for in that caſe the claim is made on the *conſtituent*, and not the *agent*, although he be the party with whom the bargain was made.

If the loſs be incurred by orders, the executor is indemnified

If a *Kázee* command an executor, whom he himſelf had appointed, to ſell a ſlave to ſatisfy the creditors of a deceaſed perſon, and the executor in obedience to this order accordingly ſell the ſlave, and the ſlave afterwards prove the right of another, or die previous to his being delivered to the purchaſer, and the price in the mean time be loſt after it had been received by the executor,—the purchaſer muſt in that caſe receive an indemnification from the *executor*, not from the *Kázee*; becauſe, having been appointed by the *Kâzee* to act as executor to the deceaſed, he is therefore a repreſentative of the *deceaſed*, and not of the *Kâzee*; and hence, in the ſame manner as the deceaſed would have been reſponſible under ſuch circumſtances, in caſe he had himſelf made the ſale during his lifetime, ſo alſo is the executor for the ſale made after his death. The purchaſer, therefore, is entitled to exact the price from the executor; and he, again, is entitled to indemnify himſelf from the creditors, ſince he acted in the buſineſs of the ſale on their behalf.—If, however, any more property of the deceaſed be afterwards diſcovered, the creditors are entitled to receive from it the payment of their debts, which are ſtill held to remain in force.—Lawyers have alſo ſaid that the creditors are, on their part, entitled to receive an indemnification from the eſtate for the compenſation they made through the executor, to the purchaſer, ſince they incurred that loſs in behalf of the deceaſed.

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* Meaning an infant ſo young as to be incapable of acting for himſelf.

and an *infant heir* ſtands in the ſame predicament with a creditor in this particular.

AN infant heir, on whoſe account any thing is ſold from the eſtate of a deceaſed perſon, is conſidered in the light of a creditor; in other words, if an infant heir ſtand in need of ſelling ſomething, and the executor accordingly make ſuch ſale for him, and the ſubject of the ſale afterwards prove the right of another,—in that caſe the purchaſer is entitled to a compenſation from the executor, and the executor from the heir.—If, on the other hand, the *Ameen* of the *Kâzee* ſell any thing in behalf of an heir which afterwards proves the right of another; the proprietor is in that caſe entitled to receive a compenſation directly from the heir, provided he be an adult; but if the heir be an infant, the *Kâzee* muſt appoint a perſon for the diſcharge of the debt from his property.

SECTION.

Any perſon may execute a puniſhment by the *Kâzee's* directions.

IF a *Kâzee* ſay to a perſon "I have ſentenced a certain man to be "ſtoned; do you therefore ſtone him;"—or, "I have ſentenced ſuch "a man to have his hand cut off; do you therefore cut it off;"—or, "I have ſentenced this perſon to be ſcourged; do you therefore ſcourge

" him;"—it is lawful for that perſon to act according to the *Kâzee*'s orders.—This is the doctrine of the *Zâhir Rawâyet.*—It is related of *Mohammed,* that he receded from this doctrine, and gave it as his opinion that the *Kâzee*'s directions, as here ſtated, are not to be obeyed unleſs his ſentence be atteſted by one juſt man; becauſe there is a poſſibility of his being in an error; and if that ſhould appear after the performance of any of theſe acts, it would be impoſſible to repair the injury thereby occaſioned.—From this it would appear that the letters of one *Kâzee* to another are not valid:—and our modern doctors greatly approve of this opinion, becauſe many *Kâzees* of the preſent age are looſe and irregular: they, however, admit the validity of letters from one *Kâzee* to another on the ground of neceſſity.—The arguments of the *Zâhir Rawâyet* upon this point are twofold.—FIRST, the *Kâzee* here gives information of a matter which he is competent to order; becauſe it was in his power to have ordered the execution of the ſentence immediately; hence, as he is liable to no ſuſpicion, he ought to be credited.—SECONDLY, obedience to a magiſtrate in authority, ſuch as the *Kâzee,* is declared to be an incumbent duty; and as obedience to him is manifeſted in a belief of his word, it is therefore incumbent to believe him.—Beſides, *Imâm Aboo Manſoor Matirady* has ſaid, " If a *Kâzee* be learned and juſt, believe and obey him, " as there is then no reaſon to ſuſpect him.—If, on the other hand, " he be juſt but ignorant, it is then requiſite to make enquiry of him " concerning the caſe; and if, after a full inveſtigation, it ſhall appear " that his ſentence was legally founded, in that caſe (and not other- " wiſe) he muſt be believed.—If, on the contrary, he be learned " but unjuſt in his conduct, or ignorant and unjuſt, his orders muſt " not be obeyed, unleſs the perſon to whom he addreſſes himſelf " diſcover the reaſon that prompted them."

Caſe of a diſputed decree, after a *Kâzee*'s diſmiſſion

IF a diſmiſſed *Kâzee* ſay to a perſon " I have taken one thouſand " *dirms* from you, and paid it to another, according to a decree which " I paſſed to that effect;" and the perſon in queſtion deny this, and aſſert from his office.

aſſert that the *Kázee* had taken it from him unjuſtly, ſtill the declaration of the *Kázee* muſt be credited, and conſequently he is not reſponſible for the ſaid ſum. In the ſame manner alſo, if a diſmiſſed *Kâzee* ſay to a perſon "I paſſed a juſt ſentence of amputation againſt "you," and the other aſſert that it was unjuſt, the word of the *Kâzee* muſt be credited. The law here proceeds on the ſuppoſition that in both theſe caſes the perſons acknowledge that the decrees were paſſed at a time when he was actually *Kázee*; and the reaſon of it is, that after ſuch acknowledgment on their part, probability is an argument in favour of the *Kázee*; becauſe the probability is that no *Kázee* will paſs an unjuſt decree. Neither is it neceſſary to exact an oath from the *Kázee* in either of theſe caſes, becauſe an oath is never put to a *Kázee*, and both the perſons in queſtion acknowledge that he was actually *Kázee* when he paſſed theſe decrees.—It is to be obſerved that if the perſon who, in the firſt caſe, by order of the *Kâzee*, took the money, or who, in the ſecond caſe, cut off the hand,—ſhould ſeverally declare that they had done ſo by order of the *Kázee*, they are not reſponſible for the conſequences, ſince the *Kâzee* was in office when he gave theſe orders, and the reſtitution of the property to its owner was an approved act on the part of the *Kázee*, in the ſame manner as if he had made the reſtitution in the preſence of the defendant.—If, on the other hand, the perſon aſſert that the *Kázee* had iſſued ſuch orders either antecedent to his appointment or after his diſmiſſion, then alſo the declaration of the *Kâzee* muſt be credited, becauſe he has referred the decree to a period which exempts him from reſponſibility. His declaration, therefore, is credited; in the ſame manner as where a perſon ſubject to periodical madneſs at fixed and certain times, having divorced his wife or emancipated his ſlave, afterwards declares that "he did theſe *during his madneſs*;"—which is credited; whence the divorce or emancipation are rendered void.—In this caſe, however, if the executioner of amputation, or the receiver of the money, acknowledge theſe deeds, they become reſponſible for them, becauſe they themſelves acknowledge the performance of acts, which induce reſponſibility,

reſponſibility; ſince the authority under which they acted is doubtful; for the aſſertion of the *Kâzee* is credited in theſe inſtances merely to procure an exemption to himſelf from reſponſibility, and not to procure it to others. It is otherwiſe in the *firſt* caſe, where theſe acts are allowed to have been performed in virtue of an order from him when he was actually *Kâzee.*—All this proceeds on a ſuppoſition that the money no longer remains in the hands of the perſon who had received it in virtue of the *Kâzee*'s decree: for if the money be ſtill in the poſſeſſion of the receiver, and he coincide with the *Kâzee* concerning the amount, it muſt in this caſe be taken from him, whether the perſon from whom it was originally taken confirm the *Kâzee*'s allegation, that "he had paid the money to that perſon whilſt he was "in office," or whether he plead that he [the *Kâzee*] had taken and paid it whilſt he was not in office; becauſe as the receiver here in fact acknowledges that the money had formerly been in the poſſeſſion of this perſon, his plea of having become *proprietor* of the money cannot be admitted but upon proof; and the mere allegation of the diſmiſſed *Kâzee* is not proof, ſince after diſmiſſion he becomes as a common perſon.

HEDÂYA.

BOOK XXI.

Of *SHAHÀDIT*, or *EVIDENCE*.

Chap. I. Introductory.
Chap. II. Of the Acceptance and Rejection of Evidence.
Chap. III. Of the Diſagreement of Witneſſes in their Teſtimony.
Chap. IV. Of Evidence relative to Inheritance.
Chap. V. Of the Atteſtation of Evidence.

CHAP. I.

Evidence is incumbent upon the requiſition of the party concerned;

IT is incumbent* upon witneſſes to bear teſtimony, nor is it lawful for them to conceal it, when the party concerned demands it from them; becauſe God ſays, in the Koran, "Let not wit-

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* Arab *Farz*; meaning an *ordained duty*, and therefore *indiſpenſible*.

" NESSES WITHHOLD THEIR TESTIMONY WHEN IT IS DEMANDED " FROM THEM;"—and alſo, " CONCEAL NOT YOUR TESTIMONY, " FOR WHOEVER CONCEALS HIS TESTIMONY IS AN OFFENDER." —The requiſition of the party, however, is a condition; becauſe the delivery of teſtimony is the right of the party, and therefore reſts upon his requiſition of it, as is the caſe with reſpect to all other rights.

but it is not obligatory in caſe in-

IN caſes inducing corporal puniſhment, witneſſes are at liberty either to give or withhold their teſtimony as they pleaſe; becauſe in caſe they are diſtracted between two laudable actions; namely, the eſtabliſhment of the puniſhment, and the preſervation of the criminal's character: the concealment of vice is, moreover, preferable; becauſe the prophet ſaid to a perſon that had borne teſtimony, "*Verily it would have been better for you, if you had concealed it*;"—and alſo, becauſe he elſewhere ſaid, "*Whoever conceals the vices of his* " *brother* MUSSULMAN *ſhall have a veil drawn over his own crimes in* " *the two worlds by* GOD."—Beſides, it has been inculcated both by the prophet and his companions as commendable to aſſiſt in the prevention of corporal puniſhment; and this is an evident argument for the concealment of ſuch evidence as tends to eſtabliſh it. It is incumbent, however, in the caſe of *theft*, to bear evidence to the *property*, by teſtifying that " a certain perſon *took* ſuch property," in order to preſerve the right of the proprietor: but the word *taken* muſt be uſed inſtead of *ſtolen*, to the end that the crime may be kept concealed: beſides, if the word *ſtolen* were uſed, the thief would be rendered liable to amputation; and as, where amputation is incurred, there is no reſponſibility for the property, the proprietor's right would be deſtroyed.

unleſs it involve *property*, when the fact muſt be ſtated in ſuch a way as may not occaſion puniſhment.

The evidence required in *whoredom* is that of *four men*;

EVIDENCE is of ſeveral kinds. The evidence required in a caſe of *whoredom* is that of four men, as has been ordained in the KORAN; and the teſtimony of a woman in ſuch caſe is not admitted; becauſe

Zibra ſays, "in the time of the prophet and his two immediate ſucceſſors it was an invariable rule to exclude the evidence of women "in all caſes inducing puniſhment or retaliation;" and alſo, becauſe the teſtimony of women involves a degree of doubt, as it is merely a *ſubſtitute* for evidence, being accepted only where the teſtimony of men cannot be had; and therefore it is not admitted in any matter liable to drop from the exiſtence of a doubt.—The evidence required in other criminal caſes is that of two men, according to the text of the KORAN; and the teſtimony of women is not admitted, on the ſtrength of the tradition of *Zibra* above quoted.—In all other caſes the evidence required is that of two men, or of one man and two women, whether the caſe relate to property, or to other rights, ſuch as marriage, divorce, agency, executorſhip, or the like.—*Shafeï* has ſaid that the evidence of one man and two women cannot be admitted, excepting in caſes that relate to property, or its dependencies, ſuch as *hire*, *bail*, and ſo forth; becauſe the evidence of women is originally inadmiſſible on account of their defect of underſtanding, their want of memory, and incapacity of governing, whence it is that their evidence is not admitted in *criminal* caſes.

in other criminal caſes, ***two men;***

and in all other matters, ***two men,*** **or** ***one man and two women.***

OBJECTION.—Since, according to *Shafeï*, the evidence of women is originally invalid, it would follow that *their* evidence alone is not admiſſible even in a caſe of *property*; whereas the evidence of four women alone is, in his opinion, admiſſible in ſuch caſe.

REPLY.—The evidence of four alone is neceſſarily admiſſible in caſes of property, becauſe of their frequent occurrence:—contrary to the mode of proceeding with reſpect to *marriage*, (for inſtance,) which being a matter of greater importance and more rare occurrence than mere matters of property, cannot therefore be claſſed with them.

—The reaſoning of our doctors is that the evidence of women is originally valid; becauſe evidence is founded upon three circumſtances, namely, ſight, memory, and a capability of communication; for by means of the firſt the witneſs acquires knowledge; by means of the ſecond he retains ſuch knowledge; and by means of the third he is enabled to impart it to the *Kázee*; and all theſe three circumſtances exiſt in a woman; (whence it is that her communication of a tradition or of a meſſage is valid:) and with reſpect to their want of memory, it is capable of remedy by the junction of another; that is, by ſubſtituting two women in the room of one man; and the defect of memory being thus ſupplied, there remains only the doubt of *ſubſtitution*; whence it is that their evidence is not admitted in any matter liable to drop from the exiſtence of a doubt, namely, retaliation or puniſhment: in oppoſition to *marriage*, and ſo forth, as thoſe may be proved notwithſtanding a doubt, whence the evidence of women is admitted in thoſe inſtances.

OBJECTION.—As the evidence of two women is admitted in the room of that of one man, it would follow that the evidence of four women alone ought to be admitted in caſes of property and other rights; whereas it is otherwiſe.

REPLY.—Such is the ſuggeſtion of analogy. The evidence of four women alone, however, is not accepted, (contrary to what analogy would ſuggeſt,) becauſe if it were, there would be frequent occaſions for their appearance in public, in order to give evidence; whereas their *privacy* is the moſt laudable.

The evidence of women alone ſuffices concerning matters which do not admit the inſpection of men.

THE evidence of one woman is admitted in caſes of *birth*, (as where one woman, for inſtance, declares that "a certain woman "brought forth a certain child.") In the ſame manner alſo, the evidence of one woman is ſufficient with reſpect to virginity, or with reſpect to the defects of that part of a woman which is concealed from man.—The principle of the law, in theſe caſes, is derived from a traditional ſaying of the prophet, "*The evidence of women is valid with "reſpect to ſuch things as it is not fitting for man to behold.*"—*Shafeï* holds the evidence of *four* women to be a neceſſary condition in ſuch caſes. The foregoing tradition, however, is a proof againſt him; and another proof againſt him is that, in the caſes in queſtion, the neceſſity

ceſſity of male evidence is remitted, and female evidence credited, becauſe the ocular examination of a *woman*, in theſe caſes, is leſs indecent than that of a man: and hence alſo, as the ſight of two or three perſons is more indecent than that of one, the evidence of more than one woman is not inſiſted on as a condition in thoſe inſtances. It is to be remarked, however, that if *two* or *three* women give evidence in ſuch caſes, it is a commendable caution, becauſe the evidence may be of an obligatory tendency.—The law with reſpect to the evidence of women in caſes of birth has been fully ſet forth in the book of divorce, treating *of the eſtabliſhment of parentage* *, where it is ſaid, that "if a man marry a woman, and ſhe bring forth a child at a period of ſix months, or more, after her marriage, and the huſband "deny the parentage, in that caſe the evidence of one woman is ſufficient to eſtabliſh it:"—and there are alſo other examples recited to the ſame effect.—The law with reſpect to the evidence of a woman in caſes of virginity, is that if a woman complain of the impotency of her huſband, and aſſert that her virginity ſtill exiſts, and another woman bear evidence of the ſame, in that caſe one year muſt be ſuffered to elapſe, and then a ſeparation muſt be effected between the huſband and wife †; becauſe virginity is a real entity, and the exiſtence of it has here been atteſted by evidence.—The ſame rule alſo holds where a perſon purchaſes a female ſlave on condition of her being a virgin, and afterwards deſires to return her, becauſe of her being a woman: for if, in that caſe, another woman ſhould examine into her condition, and then declare her to be a virgin, her evidence muſt be credited, as virginity is an entity, and the exiſtence of it is here proved by evidence:—or if, on the contrary, ſhe declare her to be a *woman*, her muliebrity (which is a defect) is eſtabliſhed in virtue of ſuch declaration, and the plea of the purchaſer holds good: whence the ſeller is required to take an oath that ſuch defect did not exiſt when he ſold her; which if he refuſe to do, he is bound to receive her back.

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* See vol. I. p. 382.

† That is, provided he ſhew no proof of virility in the interim. (See vol. I. p. 354.)

It is not admitted to prove that a child was live-born further than relates to the rites of burial.

The evidence of a woman with reſpect to *Iſthilál*[*], or the noiſe made by a child at its birth, is not admiſſible, in the opinion of *Haneefa*, ſo far as relates to the eſtabliſhment of the right of heritage in the child; becauſe this noiſe is of a nature to be known or diſcovered by men: but is admiſſible ſo far as relates to the neceſſity of reading funeral prayers over the child; becauſe theſe prayers are merely a matter of religion;—in conſequence of her evidence, therefore, the funeral prayers are to be repeated over it.—The two diſciples maintain that the evidence of a woman is ſufficient to eſtabliſh the right of heritage alſo; becauſe the noiſe in queſtion being made *at the birth*, none but women can be ſuppoſed to be preſent when it is made.—The evidence of a woman, therefore, to this noiſe, is the ſame as her evidence to a living birth; and as the evidence of women in the one caſe is admiſſible, ſo alſo is it in the other.

probity wit-

In all rights, whether of property or otherwiſe, the probity of the witneſs, and the uſe of the word *Shahàdit* [evidence] is requiſite*; even in the caſe of the evidence of women with reſpect to birth, and the like; and this is approved; becauſe *Shahàdit* is *teſtimony*, ſince it poſſeſſes the property of being *binding*; whence it is that it is reſtricted to the place of juriſdiction; and alſo, that the witneſs is required to be *free*, and a *Muſſulman*.—If, therefore, a witneſs ſhould ſay "I "know," or "I know with certainty," without making uſe of the word *Shahàdit*, in that caſe his evidence cannot be admitted. With reſpect to the *probity* of the witneſs, it is indiſpenſible, becauſe of what is ſaid in the KORAN, "TAKE THE EVIDENCE OF TWO JUST "MEN;" and alſo, becauſe the probity of the witneſſes induces a probability of the truth,—whereas the want of it in the witneſs (indicated in his commiſſion of prohibited actions) renders it reaſonable to ſuppoſe that he will aſſert falſehoods, and conſequently induces a probability of falſehood.—It is recorded, from *Aboo Yooſaf*, that an unjuſt† man, provided he be poſſeſſed of generoſity, ought to be credited; becauſe ſuch a diſpoſition renders it unlikely that he will either ſuffer himſelf to be ſuborned, or that he will wantonly aſſert a falſehood.—The firſt opinion, however, (namely, that the evidence of an unjuſt man is not to be credited,) is the moſt authentic.—With reſpect to the uſe of the word *Shahàdit*, it is indiſpenſable, becauſe all the paſſages in the KORAN, relating to evidence, uſe this word; and there is alſo a ſtrong degree of precaution in the uſe of it; for as it ſerves to expreſs an oath, people will be more cautious of uſing it falſely.

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[*] If a child die immediately on its birth, without making a noiſe, it is then conſidered in law to have been brought forth dead, and it neither ſucceeds to a portion of its father's eſtate, nor are funeral prayers read over it. If, however, it make the ſmalleſt noiſe, it is then held to die poſſeſſed of its portion, and funeral prayers are read over it. —Thus if a perſon ſhould die, leaving his wife pregnant, the diviſion of his eſtate is in that caſe ſuſpended till the birth of the child: if it prove a dead child, (that is, one that appeared dead immediately at the birth and made no noiſe,) the eſtate is divided as if no ſuch child had been born; but if it have made a noiſe, its ſhare is in that caſe allotted and divided amongſt its heirs.—The determination of the heirs, and conſequently the nature of the diviſion of the eſtate, muſt often reſt upon this circumſtance. For inſtance, if a perſon die without children, leaving a brother, and his wife who is at that time pregnant, and the child at its birth make a noiſe, and immediately after die, it is held to be an heir, and the mother, in excluſion of the uncle, ſucceeds to the whole; but if it make no noiſe before its death, the uncle is then conſidered to be an heir, and no ſhare is allowed to the child. The law is the ſame in the caſe of a grandſon, whoſe father had before died, being left under ſuch circumſtances.

the term *evidence* are eſ-

HANEEFA has ſaid that the magiſtrate ought to reſt contented with the *apparent* probity of a *Muſſulman*, and ſhould not ſcrutinize into

The *apparent*

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* In other words, it is requiſite that the witneſs ſay (in *Arabic*) "*Aſh-hado*, I teſtify," or (in *Perſian*) "*Shahàdit meyekoonam*, I bear witneſs."

† Arab. *Fâſik*. This term is fully explained elſewhere. (See Vol. I. p. 74.) With reſpect to *evidence*, *Fâſik* ſeems nearly to correſpond with the term *infamous*, as uſed by our lawyers, in treating of incompetent witneſſes. (See Blackſtone, Book III. chap. 23.)

ſices, excepting in caſes inducing *puniſhment* or *retaliation*.

into his character in ſuch a manner as to give the oppoſite party an opportunity to ſcorn him; becauſe the prophet (according to a tradition related by *Omar*) has ſaid, "*All* Mussulmans *are juſt with reſpect to evidence, excepting ſuch as have been puniſhed for ſlander*; and alſo, becauſe the probable character of all that profeſs the religion of *Iſlâm* is an abſtinence from every thing prohibited by that religion; and here it is neceſſary to reſt ſatisfied with *probability*, as the attainment of *certainty* is impracticable.—In caſes, however, inducing retaliation or puniſhment, mere *probability* is not ſufficient; and therefore a purgation of the witneſſes muſt be made; for puniſhment and retaliation are caſes in which all poſſible pretexts of prevention are to be ſought: it is therefore requiſite that, in ſuch caſes, the character of the witneſſes be ſtrictly inveſtigated:—moreover, doubt is preventive in thoſe inſtances.

If, however, their probity be queſtioned, a purgation is required.

If the defendant throw a reproach on the witneſſes, it is in that caſe incumbent on the *Kâzee* to inſtitute an enquiry into their character; becauſe, in the ſame manner as it is probable that a *Muſſulman* abſtains from falſehood, as being a thing prohibited in the religion he profeſſes, ſo alſo is it probable that one *Muſſulman* will not unjuſtly reproach another:—here, therefore, is a conflict between two probabilities; and hence the neceſſity of the enquiry of the *Kâzee* into the character of the witneſſes, that he may diſcover which of the probabilities preponderates.—It is related as an opinion of *Aboo Yooſaf* and *Mohammed*, that a ſcrutiny muſt be made, with regard to the witneſſes, both openly and privately, in all caſes whatever; ſince the decree of the *Kâzee* reſts upon proof, and proof reſts upon the integrity of the witneſſes. Beſides, an enquiry into the integrity of the witneſſes tends to preſerve the decree of the *Kâzee* from annulment; becauſe if he ſhould paſs a decree upon the *probable* character of the witneſſes, and their falſehood ſhould afterwards be diſcovered, the ſaid decree would be rendered null.—Several have alleged that this diſagreement between *Haneefa* and the two diſciples is founded on the difference

Nature of a

and an *open* purgation.

difference of the times. In the preſent age, however, decrees are paſſed in this particular according to the doctrine of the two diſciples.—A *ſecret* purgation is made by a *Kâzee* writing a letter, privately, to a *Moozkee*, or purgator, (that is, a perſon whoſe buſineſs it is to enquire into the characters of others,) and deſcribing to him the family and countenances of the witneſſes, and likewiſe their place of abode; and the purgator, in like manner, returning his anſwer privately to the *Kâzee*, leſt if it were known to the plaintiff, he might attempt to injure him. In an *open* purgation it is requiſite that the *Kâzee* ſummon together the purgator and the witneſſes, and hear the examination himſelf.—During the firſt age (that is, in the time of the prophet and his companions) an *open* purgation was practiſed; but in the preſent times a *ſecret* one is adopted, in order to avoid quarrels and contentions between the purgator and the witneſſes; for it is related as an opinion of *Mohammed* that an open purgation tends to ſedition and contention. Some have ſaid that it is requiſite that the purgator report the witneſs not only to be *juſt*, but alſo *free*; for a ſlave may be juſt, but his teſtimony is nevertheleſs invalid. Others have ſaid that his report of the *integrity* of the witneſs is ſufficient; for his freedom is eſtabliſhed [in probability] by his abode in a *Muſſulman* country;—and this is approved.

It is to be obſerved that, according to that doctrine which maintains the neceſſity of the *Kâzee*'s purgation of the witneſſes, whether the defendant challenge their probity or not,—the juſtification of them by the defendant is not of any weight; in other words, if he declare the witneſſes of the plaintiff to be upright men, yet his word is not credited; and ſuch is the doctrine of the *Zâhir Rawâyet*, from *Aboo Yooſaf* and *Mohammed*. It is alſo related, as their opinion, that the juſtification of the witneſſes by the defendant is valid; under this condition, however, (according to *Mohammed*,) that there be alſo another juſtification; for he holds that two are always required, one being in no caſe ſufficient.—The reaſoning on which the doctrine of the *Zâhir Rawâyet* proceeds in this particular, is that the defendant is, in the conception of the plaintiff and his witneſſes, a liar, and his denial of the claim unjuſt and unfounded, but in which he nevertheleſs perſeveres. He is therefore incapable of appearing as a purgator, ſince a purgator muſt be a perſon of integrity, according to all.—This proceeds on the ſuppoſition of the defendant having declared the witneſſes to be juſt men, but that in the delivery of their teſtimony they had committed an error; or that they had been overpowered by forgetfulneſs. If, however, he declare that "they have ſpoken truth," or that "they are juſt men and true ſpeakers," this amounts to an acknowledgment of the plaintiff's right, and the *Kâzee* muſt in ſuch caſe paſs a decree againſt him,—not on account of his *purgation of the witneſſes*, but of his *acknowledgment*.

One purgator

ONE purgator is ſufficient, and two are ſuperfluous, according to *Haneefa* and *Aboo Yooſaf*. *Mohammed*, on the contrary, maintains that purgation is not valid unleſs performed by *two*.—A ſimilar diſagreement ſubſiſts between them, with reſpect both to the meſſenger who goes to the purgator on the part of the *Kâzee*, and alſo the interpreter employed to explain and interpret the depoſition of the witneſſes.—The argument of *Mohammed* is, that as the power of the *Kâzee* to paſs a decree is founded upon the evidence of the probity of the witneſſes, and as the evidence of their probity is founded upon purgation, it follows that *plurality* is in this inſtance requiſite, in the ſame manner as *probity*,—or as, in caſes inducing puniſhment, it is required that the witneſſes be males.—The argument of *Haneefa* and *Aboo Yooſaf* is that purgation is not conſidered in the nature of evidence; whence neither the aſſembly of the *Kâzee*, nor the uſe of the phraſe *Shahâdit*, are required as conditions with regard to it. Beſides, the neceſſity of a plurality in evidence is a mere matter of *religion*,—in other words, is founded on a paſſage in the KORAN, in oppoſition to analogy; for the truth of any aſſertion obtains an aſcendancy from the declaration of one juſt perſon, ſo far as relates to practice, as is evident from this circumſtance, that many of the traditionary precepts which it is neceſſary to follow, have been delivered by one man;)—and as the neceſſity of a plurality in evidence is contrary to analogy, the eſtabliſhment of ſuch neceſſity in purgation, by inference from that rule, would be abſurd.

be a purgator in

As the qualifications requiſite to a witneſs are not required in a purgator, a ſlave is capable of being a purgator in a *ſecret* purgation. In an *open* purgation, however, the purgator muſt, according to all our doctors, be poſſeſſed of the qualifications neceſſary to a witneſs, becauſe of what is recorded by *Khaſáf*, that "an open purgation is reſtricted to the aſſembly of the *Kázee*."—Lawyers have obſerved, alſo, that in the purgation of witneſſes to whoredom four purgators are neceſſary, according to *Mohammed*.

SECTION.

Evidence is of

THE things which witneſſes retain, and bear teſtimony of, are of two kinds.—The firſt are thoſe which produce effect in themſelves; ſuch as ſale, acknowledgment, uſurpation, murder, and the ſentence of a judge; in all of which the effect reſults from the things themſelves; and conſequently, whenever a perſon hears or ſees any thing of importance relating to theſe matters, he may lawfully give evidence of it, without its being demanded from him; becauſe in theſe caſes, immediately upon his hearing or ſeeing, he becomes acquainted with a circumſtance which occaſions effect in itſelf, and there is therefore no need of ſuch evidence being demanded from him.—In ſuch caſe, alſo, it is requiſite that he deliver his teſtimony thus, "I give evidence that a certain perſon bought, &c." and not, "evi-

" dence has been demanded from me, &c." becauſe this latter mode of delivery is falſe. If, however, a perſon from without a door, or from behind a curtain, hear any thing ſpoken by another that is within, in that caſe he is not entitled to give evidence of the ſame; and if he ſhould atteſt it, the *Kâzee* muſt not accept it, becauſe it is illegal, ſince, as voices are often ſimilar, they cannot be diſtinguiſhed with certainty. But if, having firſt entered into the houſe, he diſcover that there is only one perſon within, and having then retired, and ſat without the door, he hear that perſon make an acknowledgment, he may then lawfully atteſt the ſame, becauſe in ſuch caſe he acquires certain knowledge.—The ſecond kind of things to which evidence relates, are thoſe which do not occaſion effect in themſelves; ſuch as *teſtimony* *, which does not occaſion effect in itſelf; becauſe, as it is merely *information*, it admits the ſuppoſition of being either true or falſe; and ſuch things as are doubtful are not deciſive proof.—Upon teſtimony being given, therefore, the hearer does not immediately know that the right is proved; and conſequently, if one perſon hear another give evidence of ſomething, he is not empowered to give evidence of the ſame, unleſs the witneſs deſire him to atteſt his evidence; becauſe evidence does not occaſion effect in itſelf, nor until it be removed to the aſſembly of the *Kâzee*.—Beſides, as the atteſtation of the evidence of another is an overt act with reſpect to that other, it is requiſite that the other previouſly appoint this perſon his deputy; and in the caſe in queſtion this is not ſuppoſed.—In the ſame manner, alſo, if a perſon hear another deſire a *third* perſon to atteſt his evidence, it is not lawful for him in ſuch caſe to give evidence of the ſame, becauſe the original witneſs appointed *another*, and not *him*, his deputy for that purpoſe.

and that the effect of which reſts upon *other* evidence.

The ſignature

IF a perſon ſee his own ſignature to a bill of ſale, or the like, he , merely on account of the ſight of his ſignature, atteſt it, unleſs he otherwiſe recollect to have witneſſed the ſaid bill; ſince hand writings are often ſimilar.—Some have ſaid that this is the doctrine of *Haneefa*; but that the two diſciples are of a different opinion.—Others, again, have ſaid that all are agreed in its being unlawful to give the atteſtation merely on the ſight of the ſignature; and that the only caſe of this kind in which there is a diſagreement is that with reſpect to a *Kázee*; for if he ſhould diſcover, in his *Dewan*, or *records*, the evidence of any one, or a decree of his own, he may, in ſuch caſe, (according to the two diſciples) paſs a decree agreeably thereto, notwithſtanding he have forgot the circumſtance; becauſe the records of the *Kázee*, being kept under his ſeal, are therefore ſecured againſt alterations, and conſequently afford certain knowledge.—It is otherwiſe with reſpect to bills of ſale or the like, becauſe theſe, as being kept in the hands of others, are not ſecured againſt alterations.—In the ſame manner, alſo, if a perſon recollect the place in which his evidence had been taken, without remembering the affair to which it related, it is the ſame as his ſeeing his ſignature without remembering his ſubſcription of it, and therefore he is not permitted to atteſt it:—and the ſame rule obtains where people in whom he places credit ſay to him, "you and we did formerly jointly atteſt ſuch particular matter."

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* Meaning teſtimony to evidence given by another.

Evidence cannot be given on *hearſay*; cept to ſuch matters as ad-

IT is not lawful for a perſon to give evidence to ſuch things as he has not actually ſeen, excepting in the caſes of birth, death, marriage, cohabitation, and the juriſdiction of a *Kázee*, to all of which he may lawfully bear teſtimony on creditable *hearſay*.—This proceeds upon a favourable conſtruction.—Analogy would ſuggeſt that it is not lawful for him to give evidence in thoſe caſes alſo; becauſe evidence is founded entirely on ſight, from which knowledge is derived; and as no certain knowledge can be acquired without ſight, it follows that evidence, in the caſes above excepted, is not valid unleſs founded upon ſight.—The reaſon for a more favourable conſtruction, in this particular, is that theſe events are of ſuch a nature as admit the privacy only of a few:—thus *birth* (for inſtance) is an event at which none is preſent but the midwife; the authority of the *Kâzee* is founded on the appointment of the *Sultan*, which is ſeen only by the *Vizier*, or at moſt a few others; marriages and deaths are ſeen by but few; and cohabitation by none. All theſe, however, are acts from which originate many important concerns. If, therefore, the reality of theſe things were not admitted upon hearſay evidence, many inconveniences would reſult: in oppoſition to caſes of *ſale*, or the like, where privacy is not required.—It is to be obſerved that it is requiſite, in theſe caſes, that the information have been received from two juſt men, or from one juſt man and two women.—Some have advanced that in caſes of *death* the information of one man or one woman is ſufficient, becauſe death is not ſeen by many, ſince as it occaſions horror the ſight of it is avoided.

and it muſt be given in an *abſolute* manner.

When a perſon, in any of the above caſes, gives evidence from creditable hearſay, it is requiſite that he give it in an *abſolute* manner, by ſaying, for inſtance, "I bear teſtimony that A. is the ſon of B." and not, "I bear teſtimony ſo and ſo, *becauſe I have heard it*,"—for in that caſe the *Kâzee* cannot accept it;—in the ſame manner as if a perſon, having ſeen a thing in the hands of A. were to ſay, "This "thing is the property of A." in which caſe his teſtimony is valid: but if he ſhould ſtate that "he gives evidence *becauſe he has ſeen the "thing in the poſſeſſion of A.*" the *Kâzee* could not accept his teſtimony.—So alſo, if a perſon ſee another ſitting in the court of juſtice, deciding in a ſuit between plaintiff and defendant, it is lawful for him to give evidence that "that perſon was a *Kâzee*:"—or, if a perſon ſee a man and woman dwelling in the ſame houſe, and conducting themſelves towards one another in the manner of huſband and wife, he may lawfully give evidence of their being huſband and wife; in the ſame manner as it is lawful for a perſon who ſees a melon in the hand of another to give evidence that it is the property of that perſon.

Evidence to

his

If a perſon ſay that he was preſent at the burial of another, or that he had read the funeral ſervice over him, this amounts to the ſame as an actual ſight of the death, inſomuch that if he ſhould explain to the *Kázee* the principle on which he gives his evidence, it will ſtill be valid.

What is above advanced, that "it is not lawful for a perſon to "give evidence to ſuch things as he has not actually ſeen, excepting "in the caſes of birth, death, marriage, cohabitation, and the juriſ"diction of a *Kázee*," is taken from *Kadooree*; and from theſe particular exceptions it may be inferred that *hearſay* evidence is unlawful in every other inſtance, ſuch as *Willa*, charitable appropriations, and ſo forth.—It is indeed related, as the laſt opinion of *Aboo Yooſaf*, that evidence from hearſay is lawful in a caſe of *Willa*; becauſe *Willa* is equivalent to relation by conſanguinity, as the prophet has ſaid "Willa *is a connection like conſanguinity*."—It is alſo related, as the opinion of *Mohammed*, that hearſay evidence is lawful in a caſe of appropriation; for as appropriation continues to operate for a long period of time, the laws with reſpect to it would be rendered null if hearſay evidence were not admitted to prove it.—Our doctors, however, argue that *Willa* is founded upon a relinquiſhment of right of property; and as, in bearing evidence to *that*, actual ſight is required, it follows that it is in the ſame manner required with reſpect to a matter derived therefrom, namely, *Willa*.—With reſpect to charitable appropriations, on the contrary, hearſay evidence muſt be admitted ſo far as regards the appropriation itſelf, (ſuch as where the witneſs ſays, "I atteſt this to be a *wakf*:) but it is not admitted with reſpect to any conditional reſtrictions impoſed by the appropriator; for although the appropriation itſelf be notorious, yet the conditions of it are not ſo.

A right of

If a perſon ſee any article, (excepting an adult male or female ſlave,) in the hands of another, he may in ſuch caſe lawfully atteſt its from ſeeing an article *in the poſſeſſion* of another:

its being the property of that other, becauſe poſſeſſion argues property, ſince in all cauſes of property, ſuch as *purchaſe*, *ſale*, or the like, poſſeſſion is the argument of its exiſtence.—For inſtance; if a perſon ſell any thing, his poſſeſſion is an argument of the legality of the ſale; and in the ſame manner, alſo, the right of property is eſtabliſhed in a purchaſe from the poſſeſſion of the ſeller, and the right of property in an heir, from the poſſeſſion of him from whom he inherits.—Hence, in giving evidence of a thing being the property of another, it is ſufficient to have ſeen it in his poſſeſſion.—It is recorded from *Aboo Yooſaf*, that beſides the *ſight* of the poſſeſſion, it is requiſite that the witneſs verily believe the article to be the property of the poſſeſſor, inſomuch that if he do not really think ſo he cannot lawfully atteſt on the poſſeſſor's behalf.—Several of our doctors alſo remark that this explanation applies to the opinion of *Mohammed*, above related, reſpecting the legality of atteſting marriage, birth, and cohabitation on hearſay;—that is, that it is lawful for a perſon to atteſt any of theſe incidents upon hearſay, provided he believe it in his own mind, but not otherwiſe.—*Shafeï* has ſaid that poſſeſſion, together with tranſaction*, argues property; (and many of the *Haneefite* doctors are alſo of this opinion;) becauſe poſſeſſion being of two kinds, namely, either in virtue of truſt or of right of property, does not argue right of property unleſs when united with the performance of acts.—Our doctors, on the other hand, argue that tranſaction is alſo of two kinds; one, in virtue of delegation, and the other in virtue of original authority;—and hence the junction of tranſaction to poſſeſſion leaves ſtill a doubt in regard to the property.—In ſhort, if a *probable* argument be adopted, poſſeſſion is then ſufficient; but if a *certain* one be required, poſſeſſion, even when joined to tranſaction, could not be ſufficient.—It is to be obſerved that the caſe here treated of admits of four ſtatements. I. Where a perſon ſees both the proprietor and the property, and is acquainted with both,—that is, with the countenance and the family of the proprietor, and with the boundaries of the property, which he ſees him poſſeſs without ſtrife; and afterwards ſees the ſame thing in the poſſeſſion of another; and the firſt proprietor appears to claim it;—in which caſe it is lawful for him to give evidence of its being the property of the firſt perſon, becauſe of his having ſeen it in his poſſeſſion. II. Where he ſees the property, and its limits, but not the proprietor;—and here alſo it is lawful for him to give evidence of the property, (upon a favourable conſtruction of the LAW) becauſe the proprietor is known, ſo far as regards his *family*, from hearſay.—III. Where he neither ſees the proprietor nor the property;—and, IV. Where he ſees the proprietor but not the property; in both of which caſes it is unlawful to give evidence with regard to the right of property.

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* Arab. *Teſerrif*; meaning (in this place) any act of maſtery performed with reſpect to the property in queſtion, ſuch as letting it out to *hire*, for inſtance.

and the right of property in a *ſlave* may alſo be atteſted on the ground

IF a perſon ſee a ſlave, male or female, in the poſſeſſion of another, and know the ſaid perſon to be a ſlave, he may lawfully give evidence to ſuch ſlave being the property of that other;—for a ſlave not being his own maſter, and of conſequence not entitled to go where he pleaſes, is apparently the property of that perſon in whoſe hands he remains. So alſo, if he ſhould not know the perſon ſeen in the poſſeſſion of another to be a ſlave, and being an infant, it ſhould be incapable of explaining its own condition, he may in that caſe lawfully give evidence of its being the property of the poſſeſſor; for an infant is not its own maſter.—But if the perſon ſeen be arrived at the age of maturity,—that is to ſay, be capable of explaining his condition,—and he ſhould not know whether he is a ſlave or not, then it is not lawful to give evidence of his being the property of the poſſeſſor, ſimply on the ſight of the poſſeſſion.—This is the reaſon of the exception, in the preceding caſe, of a ſlave arrived at the age of maturity; and the ground of it is that perſons arrived at the age of maturity are in a manner in their own poſſeſſion; and therefore the poſſeſſion of another, which indicates the right of property of that other, is not to be diſcovered from the ſimple ſight.—It is related as an opinion of *Haneefa*, that even in this caſe evidence to the right of property may lawfully be given: but what has been before related is the moſt authentic doctrine.

CHAPT. II.

Of the *Acceptance* and *Rejection* of *Evidence*.

The evidence of a *blind* man is inadmiſſible:

THE evidence of a blind man is not admiſſible.—*Ziffer* maintains that the evidence of a blind man is admiſſible with reſpect to matters in which hearſay prevails; (and there is alſo one report of the doctrine of *Haneefa* to the ſame effect;) becauſe in ſuch matters hearing only is required, and in the hearing of a blind man there is no defect.—*Aboo Yooſaf* and *Shafeï* have ſaid that the evidence of a blind man in theſe matters is lawful, provided he was poſſeſſed of ſight at the time of their occurrence; for by means of that he acquires a certain knowledge, which he is afterwards, notwithſtanding his want of ſight, capable of communicating, as that depends entirely on the tongue, which in a blind man is not defective; and it is in his power to ſhew his knowledge of the perſon with regard to whom he gives the evidence, by a deſcription of his birth and family.—Our doctors, on the other hand, argue that in the delivery of evidence there is a neceſſity to diſtinguiſh between the perſons for and againſt whom it is given; and a blind man is incapable of doing this otherwiſe than by the voice; and this is attended with a doubt; which may be avoided, by the party producing a witneſs poſſeſſed of ſight.—With reſpect to the aſſertion of *Shafeï* and *Aboo Yooſaf*, that "it is in his power to ſhew "his knowledge of the perſon with regard to whom he gives the "evidence by a deſcription of his birth and family," it may be replied that this mode has been inſtituted for a definition of the *abſent*, not of the *preſent*.—In ſhort, in the ſame manner as the evidence of a blind man is inadmiſſible in caſes relative to retaliation or puniſhments, ſo alſo is it inadmiſſible in all other caſes whatever.

If a perſon, having given evidence, ſhould afterwards become blind previous to the paſſing of the decree, in that caſe (according to *Haneefa* and *Mohammed*,) it is not lawful for the *Kâzee* to paſs a decree thereupon; for the exiſtence of the competency of the witneſſes *at the time of paſſing the decree* is a neceſſary condition, as the validity of the evidence, at that time, conſtitutes the proof; and in the caſe here ſuppoſed the evidence has at that period become null. This caſe is therefore the ſame as if a witneſs, after having given evidence, ſhould either become inſane, dumb, or unjuſt, in any of which caſes the *Kâzee* could not paſs a decree upon the evidence ſo given.—It is otherwiſe where the witneſſes, having given their evidence, either diſappear or die; for in that caſe the *Kâzee* may lawfully paſs a decree upon it; becauſe the competency of evidence is not annulled, but rather concluded, and rendered complete, by death; and *abſence* does not deſtroy this competency.

and if a perſon give evidence, and become blind, a decree cannot iſſue upon it.

The teſtimony of any perſon who is *property*,—that is to ſay, a ſlave, male or female,—is not admiſſible; becauſe teſtimony is of an authoritative nature; and as a ſlave has no authority over his own perſon, it follows that he can have no authority over others, *a fortiori*.

The evidence of a *ſlave* is not admiſſible;

teſtimony of a perſon that has been puniſhed for ſlander is inadmiſſible, even though he ſhould afterwards have repented; becauſe God has ſaid, in the *Koran*,—"But as to those who accuse "married persons of whoredom, ard produce not four "witnesses of the fact, scourge them with fourscore

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“ STRIPES, AND RECEIVE NOT THEIR TESTIMONY FOR EVER;
“ FOR SUCH ARE INFAMOUS PREVARICATORS,—EXCEPTING THOSE
“ WHO SHALL AFTERWARDS REPENT.”—The rejection of his evidence, moreover, is included as a part of the puniſhment preſcribed for the crime, as this tends to prevent the commiſſion of it in future; and as the rejection of his evidence is a part of the puniſhment, this effect muſt evidently remain after his repentance, on the ſame principle as the puniſhment itſelf is not remitted although he repent. It is otherwiſe with reſpect to a perſon puniſhed for any other crime; for the evidence of ſuch a perſon is admiſſible after repentance, ſince the rejection of it, in regard to *him*, proceeded from the ſtigma attached to his offence, which is done away by repentance.—According to *Shafeï* the evidence of a perſon puniſhed for ſlander is admiſſible, provided he have afterwards repented, becauſe God, in enjoining the rejection of the evidence of ſuch, has particularly excepted *penitents*.—Our doctors, on the other hand, argue that the exception in the divine ordinance relates to that part of it which declares ſlanderers to be *infamous prevaricators*, and not to that part which declares them to be incompetent as witneſſes. Penitence, therefore, removes the ſtigma from the character of ſuch a perſon, but does not reſtore his competency to give evidence.

but an *infidel* ſlanderer recovers his competency as a witneſs upon embracing the faith.

If an infidel, who had ſuffered puniſhment for ſlander, ſhould afterwards become a *Muſſulman*, his evidence is then admiſſible; for although, on account of the ſaid puniſhment, he had loſt the degree in which he was before qualified to give evidence, (that is, in all matters that related to his own ſect,) yet by his converſion to the *Muſſulman* faith he acquires a new competency in regard to evidence, (namely, competency to give evidence relative to *Muſſulmans*,) which he did not poſſeſs before, and which is not affected by any matter that happened prior to the circumſtance which gave birth to it.—It is otherwiſe with reſpect to a ſlave, who, having ſuffered puniſhment for ſlander, afterwards becomes free; for his teſtimony is not admiſſible after emancipation; becauſe in his former condition of ſlavery he did not poſſeſs, in any degree, ability to give evidence, and conſequently the puniſhment was incomplete, ſince it was impoſſible to ſubject him to any greater degree of diſcredit than what was before impoſed on him: the credit, therefore, which he would otherwiſe have acquired afterwards in virtue of his emancipation, is taken from him in order to complete the preſcribed puniſhment.

Evidence is not admitted in favour of relations within the degree of *paternity*;

TESTIMONY in favour of a ſon or grandſon, or in favour of a father or grandfather, is not admiſſible; becauſe the prophet has ſo ordained.—Beſides, as there is a kind of communion of benefits between theſe degrees of kindred, it follows that their teſtimony in matters relative to each other is in ſome degree a teſtimony in favour of themſelves, and is therefore liable to ſuſpicion.

nor between an *huſband* and *wife*, a *maſter* and his *ſlave*, or an *hirer* and his *hireling*.

THE prophet has ſaid, "*We are not to credit the evidence of a wife concerning her huſband, or of a huſband concerning his wife*[*]; *or of a ſlave concerning his maſter; or of a maſter concerning his ſlave; or, laſtly, of a hirer concerning his hireling.*—The author of this work obſerves that by the term *hirer* [*Ajeer*] as uſed in this place, is to be underſtood (according to the explanation of the lawyers) a ſelect ſcholar who conſiders an injury to his teacher as an injury to himſelf.—Others have ſaid that it is underſtood to mean a perſon who lets out any thing by leaſe for a month or a year; for as, at the time of giving evidence, he is entitled to the rent, in return for the uſufruct enjoyed by the other, a ſuſpicion ariſes of his having conſtituted this perſon his tenant merely with a view to procure his evidence.—With reſpect to the evidence of a huſband and wife concerning each other, *Shafeï* maintains that it is admiſſible; becauſe the property of each is diſtinct and ſeparate; and alſo becauſe diſtinct ſeizins are made, by each, of their reſpective property; whence it is that retaliation is executed upon either for the murther of the other,—and alſo, that either may be impriſoned for a debt due to the other.—Beſides, the benefit which they mutually derive from each other's property is of no account, becauſe the exiſtence of ſuch benefit is of an *involved* nature*;—in the ſame manner as the evidence of a creditor in favour of his indigent debtor is admiſſible, notwithſtanding he derive a benefit from it, as this benefit is of an *involved* nature.—The arguments of our doctors upon this point are twofold. FIRST, the traditionary precept of the prophet above quoted. SECONDLY, the benefit which, from cuſtom, the huſband and wife derive from the property of each other, which occaſions their teſtimony in favour of each other to be, in a manner, teſtimony in favour of *themſelves*, and conſequently liable to ſuſpicion.—It is otherwiſe with reſpect to the teſtimony of a creditor in favour of his indigent debtor, becauſe he has no power over the

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[*] This doctrine of the inadmiſſibility of the evidence of huſband and wife in favour of each other prevails only amongſt the *Soonis*, [the followers of *Omar*,] and has given riſe to much contention with the *Shiyas*, [the followers of *Alee*], who maintain the oppoſite doctrine.—The origin of their diſagreement on this occaſion is thus related.—The prophet in the courſe of his wars having been preſented with the village of *Fattook* by ſome Chriſtians, who ſaw the impoſſibility of reſiſting his power, determined to have divided it amongſt his companions, as was his uſual practice in regard to the ſpoils taken in war. He was afterwards, however, induced to give it to his daughter *Fatima*, in conſequence of a revelation he received from heaven, enjoining him not to give out of his own family what had been freely conferred upon him.—After his death it was ſeized upon by his ſucceſſor *Aboo Beker*; and when *Fatima* claimed it in conſequence of the gift of her father, and produced her huſband *Alee*, and her two ſons, as witneſſes, her claim was rejected by *Aboo Beker*, on the grounds of the teſtimony of relations in that degree having been declared inadmiſſible by the prophet. This tradition, thus quoted by *Aboo Beker*, has ever ſince amongſt the *Soonis* occaſioned the inadmiſſibility of the evidence of huſband and wife

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wife in favour of each other. The *Shiyas*, however, (who follow a contrary doctrine) maintain that this pretended precept of the prophet was purpoſely forged by the *Khalif* to defraud *Fatima* of her right; and in ſupport of this opinion they argue that if ſuch a precept had exiſted, it could not have been unknown to *Alee*; and that if he had known of it, he never would in ſuch caſe have appeared as a witneſs in favour of his wife.

* That is to ſay, is interwoven with, and neceſſarily ariſes from, the particular circumſtances of their relative ſituation.

property of the debtor, whereas a huſband and wife have ſuch power from uſage and cuſtom.

The teſtimo-

ſlave;

THE teſtimony of a maſter in favour of his ſlave is not admiſſible; becauſe of the tradition above quoted; and alſo becauſe, if the ſlave be not indebted to any perſon, ſuch teſtimony is in *every* reſpect in favour of himſelf;—or if, on the other hand, he *be* indebted, ſtill the teſtimony of the maſter is in *ſome* reſpect in favour of himſelf, as the matter remains in ſuſpence; for if the maſter ſhould chooſe to pay the debts, the teſtimony would be completely relative to himſelf, whereas it would not be ſo in any degree in caſe he ſhould permit the ſlave to be ſold in liquidation of the debt;—and as it is not known which mode he may follow, the teſtimony is therefore conſidered to be in ſome reſpect relative to himſelf.—It is to be obſerved that the evidence of a maſter in favour of his *Mokátib* is not admiſſible, for the reaſon here ſtated.

nor of one

ther (relative to their joint concern.)

THE teſtimony of one partner in favour of another, in a matter relative to their joint property, is not admiſſible; becauſe it is in ſome degree in favour of *himſelf*.—The teſtimony, however, of partners, in favour of each other, in matters not relating to their joint property, is admiſſible, becauſe in it there is no room for ſuſpicion.

Teſtimony in favour of an *uncle* or *brother* is admitted.

TESTIMONY in favour of a *brother* or an *uncle* is admiſſible, becauſe the property and the immunities of theſe claſſes of relations are ſeparate, and each has no power over that of the other.

The teſtimony is not admiſſible of public mourners or ſingers,

THE teſtimony of women that lament or ſing is not admiſſible, becauſe they are guilty of forbidden actions, inaſmuch as the prophet has prohibited theſe two ſpecies of noiſe.—(It is to be obſerved that this caſe alludes to a woman who laments for the adverſity of *others*, not for her *own*, and who hires herſelf out for that purpoſe.)

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or of common drunkards;

The teſtimony of a perſon who is continually intoxicated is inadmiſſible, becauſe of his commiſſion of a prohibited act.—In the ſame manner, alſo, the teſtimony of a perſon who amuſes himſelf with birds, ſuch as pigeons or hawks, is inadmiſſible; becauſe ſuch amuſement engenders forgetfulneſs; and alſo becauſe, in the practice of it, he ſees the nudities of ſtrange women, he having occaſion to ſit on the top of his houſe to fly theſe birds.—In ſome copies, inſtead of the amuſement of *Teyoor* or birds, that of *Tamboor* *, or muſical inſtruments, is written, which alludes to public ſingers; and the teſtimony of a public ſinger is not admiſſible, becauſe he is the occaſion of aſſembling a number of people to commit a prohibited action †.

or of atrocious criminals;

The teſtimony of a perſon who has committed a great crime, ſuch as induces puniſhment, is not admiſſible, becauſe in conſequence of ſuch crime he is *unjuſt*.

or of immodeſt perſons;

The teſtimony of a perſon who goes naked into the public bath is inadmiſſible, becauſe of his committing a prohibited action, in the expoſure of his nakedneſs.

or of uſurers, or gameſters;

The teſtimony of a perſon who receives uſury is inadmiſſible;—and ſo, alſo, of one who plays for a ſtake at dice, or cheſs,—becauſe gaming in that manner is ranked in the number of great crimes;—and in the ſame manner, alſo, the evidence of a perſon who omits his prayers, from an attention to theſe games, is not admiſſible.—It is to be obſerved, however, that ſimple playing at cheſs without a ſtake is of credit, ſince ſuch play does not induce a want of integrity, becauſe all our *Imâms* are not agreed in its illegality, *Mâlik* and *Shafeï* having declared it to be lawful.—It is recorded in the *Mabſoot*, that the evidence of an uſurer is inadmiſſible only in caſe of his being ſo *in a notorious degree*; becauſe mankind often make invalid contracts; and theſe are, in ſome degree, uſurious.

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* In the Arabic and Perſian, the words *Teyoor* and *Tamboor* are written exactly ſimilar; and as they can only be diſtinguiſhed from each other by the proper poſition of the diacritical points, they are therefore very liable to be confounded by the frequent omiſſion of theſe points.

† Namely, *liſtening to muſic.*

or of perſons guilty of indecorum;

The evidence of a perſon guilty of baſe and low actions, ſuch as making water or eating his victuals on the high road, is not admiſſible; becauſe where a man is not reſtrained, by a ſenſe of ſhame, from ſuch actions as theſe, he expoſes himſelf to a ſuſpicion that he will not refrain from falſehood.

or of *free-thinkers*, if they avow their ſentiments.

The evidence of a perſon who openly inveighs againſt the companions of the prophet and their diſciples is not admiſſible, becauſe of his apparent want of integrity.—It is otherwiſe, however, where a perſon conceals his ſentiments in regard to them, becauſe in ſuch caſe the want of integrity is not apparent.

The evidence of other heretics, admiſſible, but not that

The evidence of the ſect of *Hàwa** (that is, ſuch as are not *Soonis*) is admiſſible; excepting, however, the tribe of *Khetabìa*, whoſe evidence is inadmiſſible, for reaſons that will be hereafter explained.—*Shafeï* maintains that the evidence of no tribe whatever of the ſect of *Hàwa* is admiſſible, becauſe the heterodox tenets they profeſs argue the higheſt degree of depravity.—Our doctors, on the other hand, argue that although their tenets be in reality wrong, yet their adherence to them implies probity, ſince they have been led to embrace them from an opinion of their being right; and there is, moreover, reaſon to think that they will abſtain from falſehood, becauſe it is prohibited in every religion. Hence the caſe is the ſame as if a perſon ſhould eat of an animal which had not been ſlain according to the preſcribed form of *Zabbah*, becauſe of its being lawful amongſt his ſect. It is otherwiſe where the baſeneſs proceeds from the *actions*, not from the *belief*.—With reſpect to the ſect of *Khetabia*, it is to be obſerved that they are in a high degree heretics; and amongſt them it is lawful to bear poſitive teſtimony to a circumſtance on the grounds of another having ſworn it to them. Some have ſaid that it is an incumbent duty upon that ſect to give evidence in favour of each other, whence their teſtimony is not free from ſuſpicion.

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* Anglice, the *air*; a deriſive appellation given by the *Soonis* to the *Shiyas*.—*Hàwa*, alſo, is uſed to expreſs the ſenſual paſſions, whence the term *Ahil Hàwa* ſignifies *ſenſualiſts*, or *epicureans*.

may teſtify concerning each other.

THE teſtimony of *Zimmees* with reſpect to each other is admiſſible, notwithſtanding they be of different religions.—*Mâlik* and *Shafeï* have ſaid that their evidence is abſolutely inadmiſſible, becauſe, as infidels are unjuſt [*], it is requiſite to be ſlow in believing any thing they may advance, GOD having ſaid (in the KORAN) "WHEN AN "UNJUST PERSON TELLS YOU ANY THING, BE SLOW IN BELIEVING "HIM;"—whence it is that the evidence of an infidel is not admitted concerning a *Muſſulman*; and conſequently, that an infidel ſtands (in this particular) in the ſame predicament with an apoſtate.—The arguments of our doctors upon this point are twofold.—FIRST, it is related of the prophet, that he permitted and held lawful the teſtimony of ſome *Chriſtians* concerning others of their ſect.—SECONDLY, an infidel having power over himſelf, and his minor children, is on that account qualified to be a witneſs with regard to his own ſect; and the depravity which proceeds from his faith is not deſtructive of this qualification, becauſe he is ſuppoſed to abſtain from every thing prohibited in his own religion, and falſehood is prohibited in every religion. It is otherwiſe with reſpect to an apoſtate, as he poſſeſſes no power, either over his own perſon, or over that of another; and it is alſo otherwiſe with reſpect to a *Zimmee* in relation to a *Muſſulman*, becauſe a *Zimmee* has no power over the perſon of a *Muſſulman*.—Beſides, a *Zimmee* may be ſuſpected of inventing falſehoods againſt a *Muſſulman*, from the hatred he bears to him on account of the ſuperiority of the *Muſſulmans* over him.

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[*] Arab. *Fâſik*; meaning, in this place, *degenerate* or *depravid*.

OBJECTION.—In the ſame manner as there ſubſiſts an enmity between *Muſſulmans* and *Zimmees*, ſo alſo is there an enmity between the followers of other religions, ſuch as the *Jews*, the *Chriſtians*, and the *Magians*: it would follow, therefore, that amongſt theſe the teſtimony of thoſe of one religion cannot be admitted with relation to others of a different religion;—whereas it hath been declared admiſſible.

REPLY.—Although the religions of theſe be different, yet none of them being under ſubjection to another, ſo as to engender reciprocal hatred, there is no cauſe to ſuſpect that they will invent falſehoods againſt each other.

THE teſtimony of an infidel *Mooſtámin* with relation to a *Zimmee* is not admiſſible, becauſe he has no power over the perſon of a *Zimmee*, as the latter is a fixed reſident in the *Muſſulman* territory. The evidence of a *Zimmee*, however, is admiſſible with reſpect to an infidel *Mooſtámin*, in the ſame manner as the evidence of *Muſſulmans* with relation to them is valid.

A *Mooſtâmin* cannot teſtify concerning a *Zimmee*; but a *Zimmee*

Mooſtâmin;

THE teſtimony of one *Mooſtâmin* is admiſſible with reſpect to another *Mooſtâmin*, provided he be of the ſame country. If, however, they be of different countries (ſuch as a native of *Ruſſia* and of *Turkey*) their teſtimonies with reſpect to each other are not admiſſible; becauſe this difference precludes the operation of their power over each other; whence it is that they cannot inherit of each other.

and

mins may

tify concerning each

country.

Theteſtimony

virtues preponderate;

The teſtimony of him whoſe virtues exceed his vices, and who is not guilty of great crimes, is admiſſible, notwithſtanding he may occaſionally be guilty of *venial* crimes.—What is here advanced is an explanation of the degree of integrity to which regard is paid in bearing evidence: and this explanation is approved; for innocence with reſpect to *great* crimes, and a preponderance of virtue over vice, muſt neceſſarily be deemed ſufficient, on this principle, that if any occaſional commiſſion of ſmaller crimes were deſtructive of teſtimony, the door of evidence would be ſhut, whilſt the preſervation of the rights of mankind requires that it ſhould be kept open.

and of ſuch as remain uncircumciſed

The teſtimony of on *Acklif* (that is, of one who has omitted circumciſion on account of old age, or for ſome other ſufficient reaſon) is admiſſible, becauſe the omiſſion of this ceremony is not deſtructive of juſtice;—excepting where it ariſes from a contempt of religion, or of the authority of the oral law by which it is enjoined, for in that caſe integrity no longer remains.

or of an eu-

The teſtimony of an *eunuch* is admiſſible, becauſe *Omar* accepted the teſtimony of *Alkia*, who was an eunuch; and alſo, becauſe he has been deprived of one of his members by *violence*, and therefore ſtands in the ſame predicament with one who has been mutilated.

The teſtimony of a *baſtard* is valid, becauſe he is innocent with reſpect to the immorality of his parents. *Imâm Mâlik* maintains that the teſtimony of a baſtard is not to be admitted with reſpect to *whoredom*, as it may naturally be ſuppoſed he wiſhes as many others as poſſible reduced to the ſame level with himſelf, and his teſtimony in a matter of this kind is therefore liable to ſuſpicion.—Our doctors, however, argue that the preſent queſtion relates merely to the point of *integrity*; and if a baſtard be a juſt man, there is no reaſon to ſuſpect him of ſuch a wiſh.

THE teſtimony of a hermaphrodite is admiſſible, becauſe ſuch a perſon is either a man or a woman, and the evidence of both is admiſſible.

or of an *hermaphrodite*;

THE teſtimony of a governor on the part of the ſultan is admiſſible, according to a majority of the *Haneefite* doctors, provided he do not enforce oppreſſion; but if he act oppreſſively his teſtimony is not admiſſible. Some have ſaid that in the latter caſe alſo his teſtimony is admiſſible, provided he be himſelf a man of generoſity and character, and be not guilty of boaſting and vain talk; becauſe it is in ſuch caſe natural to ſuppoſe that a regard for his reputation will prevent his aſſerting a falſehood; and the dignity of his character will deter any one from offering him a bribe.

or of a *viceroy*.

WHERE two brothers atteſt that their father had appointed a particular perſon to be his executor, if that perſon alſo claim the ſame, their teſtimony is valid, upon a favourable conſtruction,—but not if he *deny* the appointment.—Analogy would ſuggeſt that their teſtimony is not valid in either caſe;—(and a caſe where two legatees atteſt that the teſtator had appointed a particular perſon his executor,—or where two debtors or creditors of the deceaſed aſſert the ſame,—or where two executors atteſt the junction of a third perſon with them in the executorſhip,—is ſubject to the ſame analogy;)—becauſe their evidence is in ſome degree advantageous to the witneſſes themſelves, in as much as the advantage to be derived from it reſults to *them* alſo. The reaſon for a more favourable conſtruction in this particular is that as it is the duty of the *Kâzee* to appoint an executor where it is required, and where the death of the perſon is notorious, the evidence in queſtion is admiſſible, inaſmuch as it exempts the *Kâzee* from this trouble, and *not* becauſe it eſtabliſhes the proof of any thing.—It is therefore a ſubſtitute for the caſt of a die, which ſaves the trouble of election.

Two brothers atteſting their father's appointment of an executor muſt be credited, if the executor verify their teſtimony; and the ſame legatees, two debtors or creditors, or two

OBJECTION.—Where there are two executors, there is no occaſion for the *Kâzee*'s appointment of a third, and therefore the appointment of a *third*, upon ſuch a ground, is unwarrantable.

REPLY.—The two executors having acknowledged that the deceaſed had joined a third perſon with them, the *Kâzee* is therefore required to confirm him, ſince, in conſequence of ſuch acknowledgement they cannot act without him.

—It is to be obſerved that where the debtors of the deceaſed atteſt the executorſhip of a particular perſon, their evidence is admiſſible, whether the death of the other be notorious or not, becauſe ſuch evidence is an acknowledgment affecting themſelves; and the death of the creditor is therefore eſtabliſhed with reſpect to them, becauſe of their acknowledgment.

Atteſtation to a perſon's appointment of an *agent* is not to be credited.

IF two brothers bear teſtimony that their abſent father had appointed *Zeyd* an agent for the receipt of debts due to him at *Koofa*, their evidence is inadmiſſible, whether *Zeyd* claim the ſaid agency or not;—for the *Kâzee* has no power of himſelf to appoint an agent in behalf of an abſentee; and the evidence is not in this inſtance ſufficient to warrant it, ſince it is liable to ſuſpicion.

A defendant's impeachment of the integrity of witneſſes is not credited, unleſs he ſtate their commiſſion of ſome ſpecific crime,

IF a defendant reproach a witneſs with a thing which would impeach his legal integrity, but which does not involve any of the rights of the ſpiritual or temporal LAW, and produce evidence in ſupport of his aſſertion, the *Kâzee* muſt not hear them, nor paſs a decree of the injuſtice of the witneſſes; becauſe this injuſtice is a thing of a nature which comes not within the juriſdiction of the *Kâzee*, inaſmuch as it is not permanent, being removeable by repentance.—Beſides, the evidence adduced in this caſe tends to lay open faults*:—now the concealment of faults is incumbent, and the manifeſtation of them prohibited: as, therefore, a witneſs, in giving evidence to this effect, is himſelf guilty of irregularity, his teſtimony cannot be heard; for the manifeſtation of faults is admitted only where it tends to maintain the rights of others; and that is only in ſuch caſes as fall within the juriſdiction of the *Kâzee*;—but the caſe in queſtion is not of that nature; and therefore the evidence cannot be admitted.—If, however, witneſſes were to give evidence that the plaintiff had himſelf acknowledged the irregularity of the witneſs, the evidence would in that caſe be valid; becauſe acknowledgment is a thing which falls within the juriſdiction of the *Kâzee*.

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* By faults is here underſtood *venial treſpaſſes*, ſuch as might deſtroy the legal integrity of a witneſs, but which do not amount to *crimes*.

or adduce evidence to the plaintiff's acknowledgment of their irregularity.

If a defendant bring witneſſes to prove that the plaintiff had *hired* his witneſſes for ten *dirms* (for inſtance,) ſuch evidence muſt not be admitted; becauſe, although it tend to prove ſomething *more* than a mere *irregularity*, yet the defendant not being a regular adverſary of the plaintiff in regard to this matter, has no right to eſtabliſh it by evidence, ſince, with reſpect to this point, he is as it were a ſtranger.—If, however, the defendant be a *regular adverſary*,—(as if, for inſtance, he ſhould aſſert that the plaintiff had hired his witneſſes to give evidence for ten *dirms* from property which he [the defendant] had put in his hands,)—in that caſe the evidence he produces in ſupport of his allegation muſt be admitted; becauſe the defendant is in this inſtance a regular adverſary of the plaintiff in a matter of property; and the proof in regard to the property neceſſarily involves the proof of the reproach.—In the ſame manner alſo, the evidence adduced by the defendant is admitted where he aſſerts that "he had compounded with the witneſſes for a certain ſum of money that they ſhould withhold their teſtimony in ſupport of ſuch unfounded claim,—and that, having accordingly paid the ſtipulated ſum, they had nevertheleſs given their evidence, and he therefore prefers a claim for the ſum paid to them;"—for here the proof with reſpect to the claim would alſo eſtabliſh the proof of the reproach. Lawyers have obſerved that as the teſtimony of witneſſes is admitted with re-

He is

to their being *hired* by the plaintiff,

unleſs his own property be involved.

ſpect to any thing that falls within the juriſdiction of the *Kâzee*, it follows that if the defendant bring witneſſes to prove that the witneſs of the plaintiff is a *ſlave*, or that he has been puniſhed for ſlander, or that he is a drunkard, or a ſlanderer, or a partner of the plaintiff,—in all theſe caſes the evidence ſo adduced muſt be admitted.

A witneſs's immediate acknowledgment of miſſtatement or omiſſion, from *apprehenſion*, does not deſtroy his credit.

If a perſon give evidence, and before moving from the place, or, the *Kâzee* paſſing a decree upon it, declare that "he had given a part "of his evidence under the influence of apprehenſion," ſtill, if he be a perſon of character *, the depoſed matter to which he adheres muſt be credited.—The term *apprehenſion*†, as here uſed, implies that a fault has been committed, either by withholding part of the evidence which it was incumbent to have mentioned, or by reciting, from forgetfulneſs, ſomething that was falſe.—The reaſon of admitting the evidence, in this caſe, is becauſe the apprehenſion probably aroſe from the awe excited by the aſſembly of the *Kâzee*; which is excuſed provided the perſon be juſt, and that he rectify his error in time.—It is otherwiſe where a perſon ſeparates from the aſſembly of the *Kâzee*, and afterwards returns and ſays, "I have omitted part of my evidence "from apprehenſion;" for in that caſe his evidence would not be admitted; becauſe there is reaſon to ſuſpect a collufion with the plaintiff, which requires that caution be uſed; and alſo, becauſe although any addition or diminution, after the delivery of the evidence, be accepted, and either added to, or deducted from, the original evidence, provided they be made in the ſame meeting, ſtill this is not allowed in caſe of their being made at a *different* meeting. The ſame rule alſo holds with regard to the miſtakes of a witneſs in explaining the boundaries of a houſe;—as if he ſhould ſay (for inſtance) the *eaſt* inſtead of the *weſt*; or in explaining genealogy, as if he ſhould ſay (for inſtance) "*Mohammed, the ſon of* AHMID," inſtead of "*the ſon of*

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* Arab. *Adil*: literally, a *juſt* perſon; (in oppoſition to *Fâſik.*)

† Arab. *Tawâham.*

"ALEE."—It is to be obſerved that the expoſition of the law, in this caſe, applies only to the addition, by the witneſs, of ſome circumſtance which may be in its nature doubtful; for if it ſhould be in no reſpect doubtful, then he may at any time afterwards, whether at the ſame meeting or not, lawfully add it to his evidence.—Thus if a witneſs omit the uſe of the word *Shahâdit*, or the like, and afterwards declare this omiſſion, it is in that caſe admitted, whether it be at the ſame meeting or not,—provided he be a juſt man.—It has been related, as an opinion of *Haneefa* and *Aboo Yooſaf*, that whatever addition or diminution a witneſs may make after the delivery of his evidence, ſhall in every caſe be admitted, although it be at a different meeting,—provided the witneſs be a juſt man.—But the firſt doctrine is the moſt authentic, and decrees paſs accordingly.

CHAP. III.

Of the Diſagreement of Witneſſes in their Teſtimony.

Evidence repugnant to the claim cannot be admitted.

WHERE the evidence adduced by a claimant is conformable to the claim, it is worthy of credit; but not where it is *repugnant* to it; becauſe, in matters concerning the rights of the individual, the priority of the claim is requiſite to the admiſſion of evidence; and this exiſts in the *former* inſtance, but not in the *latter*, ſince in the *former* the object of evidence (namely, a verification of the claim) is anſwered,—whereas in the *latter* the evidence tends to a falſification of it, and it is therefore the ſame as if no evidence at all were produced *.

The witneſſes muſt perfectly agree in their teſtimony.

The concurrence of the witneſſes, in words and meaning, is requiſite, according to *Haneefa.*—If, therefore, one witneſs bear teſtimony to one thouſand *dirms* being due, and the other to two thouſand, no credit is to be given to either.—The two diſciples are of opinion that the evidence is to be credited to the amount of one thouſand *dirms:* and a ſimilar diſagreement alſo ſubſiſts in a caſe where one witneſs atteſts *one* divorce, and the other *two* or *three* divorces.—The arguments of the two diſciples are that the witneſſes agree in the *ſmalleſt* amount, (ſuch as in *one* thouſand *dirms*, or in *one* divorce;) and one of them, beſides his agreement in this amount, atteſts an additional quantity.—Their evidence, therefore, muſt be admitted in the degree in which they concur; and the teſtimony of one, ſo far as it relates to the *exceſs* only, muſt be rejected.—The reaſoning of *Haneefa* is that the witneſſes differ in *words*, and conſequently in *meaning*, ſince meaning is extracted from words. Thus *two* thouſand (for inſtance) can never be conſtrued to mean *one* thouſand, as the terms are eſſentially different.—In the caſe in queſtion, therefore, the *one* thouſand, and the *two* thouſand, reſpectively, are atteſted by only one witneſs; and the caſe is conſequently the ſame as if their teſtimony had related to different articles,—as if one were to atteſt *dirms*, and the other *deenars*, for inſtance.

may be cre- the ſmalleſt

If a perſon claim a debt of one thouſand five hundred *dirms*, and one of his witneſſes bear teſtimony to one thouſand, and the other to one thouſand five hundred, in that caſe the teſtimony muſt be credited in the amount of one thouſand *dirms* *; for the witneſſes concur in that amount, both in words and meaning, as one thouſand is mentioned by both, and five hundred is an additional part of the ſpeech, which adds force to the former part, inſtead of deſtroying it.—Analogous to this is one divorce and one divorce and an half; or one hundred *dirms* and one hundred and fifty *dirms*; that is to ſay, in both theſe caſes the evidence is admitted in the leaſt degree, namely, in the degree of one divorce, and to the amount of one hundred *dirms*.—It would be otherwiſe if one witneſs ſhould atteſt ten *dirms*, and the other fifteen; becauſe this is ſimilar to the atteſtation of *one* thouſand and *two* thouſand, the effect of which has been before ſtated.

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* To exemplify this caſe,—ſuppoſe a perſon were to claim the right of property in a houſe, on the plea of his having purchaſed it; and his witneſs atteſt the right of property from its having been given to him;—in that caſe the evidence ſo given would be rejected.

amount in which they agree both in

The evidence of a witneſs who atteſts a larger ſum than the claim amounts to is null.

In a caſe where one witneſs atteſts one thouſand *dirms*, and the other one thouſand five hundred, and the claimant expreſsly declares that only *one* thouſand *dirms* is due to him, the teſtimony for one thouſand five hundred is null, as being falſified by the claimant †.—The effect is alſo the ſame where the claimant alleges one thouſand *dirms*, and one of the witneſſes atteſts one thouſand, and the other one thouſand five hundred; for here alſo the claimant falſifies the teſtimony of one of his witneſſes, inaſmuch as his claim is different from it. A conformity, therefore, between the claim and the evidence is indiſpenſably neceſſary: and hence, if the claimant ſhould ſay "my original claim was one thouſand five hundred *dirms*, but I "received five hundred," or "I exempted the debtor from five

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* The difference between this and the preceding caſe turns entirely on the terms in which the teſtimony is delivered; for in the caſe here conſidered the witneſs, in mentioning *one thouſand five hundred*, mentions the term *one thouſand*, which ſo far coincides with the teſtimony of the other witneſſes;—whereas, in the former inſtance, the witneſſes coincide only in the term *thouſand*, which is not perfectly definite.

† Conſequently the claimant muſt produce another witneſs, as *two* are required to eſtabliſh his claim.

"hundred;" in that caſe each of the above mentioned teſtimonies would be credited, becauſe of their conformity with the claim.

Evidence to a debt is not annulled by a ſubſequent declaration of part of the debt having been diſcharged.

If two perſons give evidence to a debt of one thouſand *dirms*, and one of them afterwards declare that the debtor had paid five hundred *dirms* of it, ſtill the evidence of one thouſand *dirms* being due muſt be credited, and that of the five hundred having been paid muſt be rejected.—The reaſon of this is, that *both* witneſſes agree in the debt of one thouſand *dirms*, whereas *one* witneſs only atteſts the payment of five hundred *dirms*; and as two witneſſes are requiſite to eſtabliſh proof, the teſtimony in the firſt inſtance is therefore admitted as proof; and the additional declaration (of one thouſand *dirms* having been paid) is rejected.—It is related as an opinion of *Aboo Yooſaf* that in this caſe the claimant is entitled only to five hundred *dirms*, becauſe the ſum of the teſtimony of the witneſs who atteſts the payment of five hundred *dirms* is, that the debt in fact amounts only to *five hundred.* The above explanation, however, is a full refutation of this opinion. It is to be obſerved that when the witneſs is informed of any partial diſcharge of the debt, (as in the caſe, for inſtance, of *five hundred* out of the *thouſand*,) he muſt not bear teſtimony to the debt of one thouſand until the creditor make an acknowledgment of the receipt of five hundred; for otherwiſe he would be conſidered as aiding the injuſtice of the creditor.—In the *Jama Sagheer* it is related, that if two perſons atteſt a debt of one thouſand *dirms* due by *Omar* to *Zeyd*, and one of them afterwards bear teſtimony to *Omar* having paid five hundred of it, and the claimant deny the ſame,—in that caſe their evidence of the debt, in which they both agree, muſt be credited; and the ſingle teſtimony of one, with regard to the payment, muſt be rejected.—*Tahâvee* reports it as an opinion of our doctors, that the evidence to the debt is not to be credited; (and *Ziffer* has adopted this opinion;) becauſe the claimant contradicts the teſtimony of the payment.—To this, however, it is anſwered, that although the claimant do contradict this latter teſtimony, yet he does not contradict the firſt evidence, which is eſtabliſhed in its validity by the concurrence of two.

The evidence of witneſſes who agree *time*, but differ with reſpect to *place*, muſt be rejected.

If two perſons bear teſtimony that a certain perſon had killed on the feſtival of the ſacrifice, at *Mecca*; and two others bear teſtimony that the ſaid perſon had killed *Zeyd*, on the ſame day, at *Koofa*; in ſuch caſe, if all theſe witneſſes be aſſembled at the ſame time, in the preſence of the *Kázee*, the whole of their teſtimonies muſt be rejected; becauſe, of the evidence of the *two* parties, it is undoubtedly certain that *that* of *one* of them muſt be falſe, and there is no criterion to aſcertain to which the preference belongs.—If, on the contrary, the evidence of one of theſe parties precede that of the other, and the *Kázee* in conſequence paſs ſentence, and afterward two others exhibit evidence of a different nature, in that caſe the *Kázee* muſt not admit the evidence of the latter, becauſe the firſt evidence, in virtue of the iſſue of the decree conſequent upon it, acquires a ſuperiority over the latter, which prevents its annulment.

Evidence to the theft of an animal is not annulled by a difference between the witneſſes with reſpect to the *colour*, but it is ſo by a difference

If two perſons atteſt the theft of a cow, but differ in regard to the *colour* of it, their evidence is nevertheleſs valid, and the hand of the thief muſt in conſequence be cut off.—If, on the contrary, one of the witneſſes declare the animal to be a *cow*, and the other allege that it is a *bull*, their evidence, in ſuch caſe, is not admiſſible, and the hand of the thief muſt not be cut off.—This is the doctrine of *Haneefa*.—The two diſciples maintain that the thief is not to ſuffer mutilation in either caſe. Some have ſaid that this diſagreement proceeds on the ſuppoſition of the atteſted colours being in ſome degree ſimilar, ſuch as *red* and *black*, and not where they differ completely, ſuch as *black* and *white*. Others again have ſaid that it ſubſiſts in all caſes where the witneſſes differ with reſpect to the colour. The reaſoning of the two diſciples is, that the theft of a *black* cow is different from that of a *white* cow; in other words, they are two diſtinct animals; and hence the due quantity of evidence (namely, that of *two witneſſes*) does not appear with reſpect to either allegation of theft.—It is therefore the ſame as if two perſons were to teſtify that a certain perſon had *uſurped* the cow of ſuch a perſon, but to diſagree with reſpect to the *colour* of the cow;—in which caſe the evidence of both would be rejected; and ſo alſo in the preſent inſtance, *a fortiori*, becauſe the penalty annexed to theft (namely, *amputation*) is of a moſt grievous nature. Hence a difference of the witneſſes with reſpect to the *colour* is the ſame as a difference with reſpect to the *gender*.—The argument of *Haneefa* is, that in a caſe of difference between the witneſſes concerning the *colour* of the animal, it is poſſible to reconcile the contradiction by ſuppoſing the witneſſes to have viewed the cow from a diſtance, and in the night-time, ſince thefts are moſt commonly perpetrated at that ſeaſon;—and colours are of a deceptious nature:—cattle, moreover, are often *pye-balled*; and it is therefore poſſible that the cow may be black on one ſide, which was ſeen by one of the witneſſes, and white on the other ſide, which was ſeen by the other witneſs.—It is otherwiſe in a caſe of *uſurpation*, ſince that moſt commonly happens in the day-time, and conſequently the fact is moſt probably ſeen in the light, and near at hand. It is alſo otherwiſe with reſpect to the *ſex* of the animal, ſince two ſexes cannot unite in the ſame creature. Beſides, a knowledge of the ſex requires a cloſe inſpection, and hence the caſe does not admit of uncertainty.

Evidence to prove a contract is annulled by any difference with reſpect to the *terms* of

IF one perſon atteſt that *Zeyd* had purchaſed a ſlave for one thouſand *dirms*, and another that he had purchaſed the ſaid ſlave for fifteen hundred *dirms*, in that caſe the evidence of both is null; becauſe the object of the evidence is to eſtabliſh a cauſe of property, namely, the contract of ſale; but the mention of two prices neceſſarily implies the exiſtence of *two* contracts; and the proof of either of theſe is defective, as there is only one witneſs to each. This caſe proceeds on the ſuppoſition of the *buyer* being the plaintiff; but the effect is the ſame in caſe of the claim having been made by the *ſeller*;—and it matters not whether, of the two ſums atteſted, the plaintiff claim the largeſt or the ſmalleſt; becauſe the proof is defective on either ſuppoſition, for the reaſon already explained.—The ſame rule alſo holds with reſpect to a contract of *Kitâbat*; that is, where a *Mokâtib* and his maſter diſagree with reſpect to the amount of the ranſom or conſideration of *Kitâbat*, and the two witneſſes likewiſe diſagree in their teſtimony, the evidence, in ſuch caſe, is null, ſince the object of it (namely, the eſtabliſhment of the contract of *Kitâbat*) is defective, for the reaſons already explained;—and this, whether the *maſter* or the *ſlave* be the plaintiff. It is alſo the ſame with reſpect to *Khoola*, manumiſſion for a compenſation, and compoſition for wilful murder, provided the claim be preferred by the wife, the ſlave, or the murderer;—becauſe in all theſe caſes the object of the evidence is the ſame, (namely, the eſtabliſhment of the exiſtence of a contract,) and is defeated by any diſagreement of the witneſſes.—But if, in any of theſe caſes, the claim be preferred by the oppoſite party, it then becomes equivalent to a caſe of debt, and the law takes place accordingly.—Thus, if the claim be for one thouſand five hundred *dirms*, and one of the witneſſes declare it to be one thouſand, and the other one thouſand five hundred, in that caſe, according to all our doctors, a decree muſt be given for one thouſand *dirms*.—If, on the contrary, the claim be for two thouſand *dirms*, and one witneſs atteſt to one thouſand, and the other two thouſand, in that caſe nothing can be decreed, according to *Haneefa*; whereas, according to the two diſciples, one thouſand muſt be decreed.—The principle on which theſe caſes reſemble debt is, that the pardon for murder, the freedom of a ſlave, or the divorce of a wife, is eſtabliſhed by the acknowledgment of the perſon to whom each of theſe rights appertain.—Hence, in ſuch caſe, his *claim of debt* only remains, and there is no occaſion for the proof of the contract.—In the caſe of a *pledge*, if one witneſs atteſt that it was pawned for one thouſand *dirms*, and the other that it was pawned for one thouſand five hundred, and the claim be preferred by the pawner, the evidence is in that caſe inadmiſſible; becauſe the pawner has no advantage in preferring ſuch a claim, ſince he cannot reſume his pawn until he pay the debt oppoſed to it.—His claim, therefore, is not regarded; and ſuch being the caſe, the evidence he adduces is, as it were, evidence without a claim; and evidence without a claim is inadmiſſible.—If, on the contrary, the claim be preferred by the pawn-holder, it is the ſame as a claim for debt.—In a caſe of *hire*, if one witneſs teſtify to one thouſand *dirms*, and the other to one thouſand five hundred, then, provided this difference happen at the beginning of the term of hire, it is analogous to a ſimilar difference concerning a *ſale*; but if it happen after the expiration of the term, and the claim be preferred by the hirer, it is a claim of *debt*.—In a caſe of *marriage*, if one of two witneſſes teſtify to a dower of one thouſand *dirms*, and the other to a dower of fifteen hundred, the dower is eſtabliſhed in the amount of one thouſand *dirms*, according to *Haneefa*, whether the claim be preferred by the huſband or wife, and whether it be for the ſmalleſt or greateſt of the atteſted ſums. This is according to a favourable conſtruction. The two diſciples, arguing from analogy, maintain that the evidence is totally inadmiſſible.—(It is, however, recorded in the *Amâlee*, that the opinion of *Aboo Yooſaf*, in this inſtance, accords with that of *Haneefa.*)—The reaſoning of the two diſciples, in ſupport of their opinion, is that the diſagreement of the witneſſes with regard to the amount of the portion is in fact a diſagreement with regard to the *marriage contract*, ſince the object of both is the eſtabliſhment of a cauſe, namely, the ſaid contract;—the diſagreement in this inſtance, therefore, is analogous to a ſimilar diſagreement with regard to ſale.—The reaſon for a more favourable conſtruction of the LAW in this particular, as adopted by *Haneefa*, is that *property*, in the caſe of marriage, is merely a ſubordinate point, the original object of it being to legalize generation, to unite the ſexes, and to endow the man with a right in the woman's perſon. Now as there is no difference whatever upon theſe points, they are accordingly eſtabliſhed in the firſt inſtance; and if any diſagreement then occur concerning the ſubordinate or dependant point, the ſmalleſt ſum atteſted is decreed, ſince

except it regard a wo-ſince to that amount both witneſſes agree.—What is here advanced, that the caſe is the ſame "whether the claim be for the *ſmalleſt* or for the *greateſt* atteſted ſum,"—is approved.—Some of the learned have ſaid, that the difference of opinion between *Haneefa* and the two diſciples proceeds only on the ſuppoſition of the claim having been preferred by the woman: for that, in caſe of the claim being made by the huſband, they are all agreed in regard to the inadmiſſibility of the evidence; ſince his object can only be the eſtabliſhment of the *contract*, whilſt the object of the woman is the *property*.—Others again have ſaid that this difference of opinion obtains in either caſe; and this is approved.

CHAP. IV.

Of Evidence relative to Inheritance.

Evidence muſt be adduced to prove the death of the inheritee and

It is a rule, that if an inheritee's * right of property in any thing be proven, ſtill a decree cannot paſs in favour of the heirs, until proof be adduced of the death of the inheritee, and of their right of heritage.—This rule obtains with *Haneefa* and *Mohammed.* *Aboo Yooſaf* main-the right of the heirs, before inheri-

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* Meaning, the perſon from whom inheritance is derived. The tranſlator is aware that this term is not ſanctioned by authority, *Anceſtor* being the phraſe generally uſed in our law-books.—The nature of the *Muſſulmen* laws of inheritance, however, renders it neceſſary to adopt ſome term of more general import, ſince, according to theſe, inheritance may either *aſcend* or *deſcend.*—The tranſlator, therefore, has adopted this term, both in order to avoid the inconvenience of a perpetual pariphraſis, and alſo becauſe it literally expreſſes the ſenſe of the *Arabic* term *Mauris*, ſignifying "*inherited from.*"

It ſuffices that the witneſſes atteſt either the inheritee *at the time of*

tains that the thing muſt be immediately decreed to the heir; for he alleges that the property of the heir is, in fact, the property of the inheritee, and conſequently that evidence to the inheritee's right of property in any thing is, in fact, evidence to his heir's right of property in that thing.—*Haneefa* and *Mohammed*, on the contrary, allege that the right of the heir is inchoate and extant *de novo*, with reſpect to all the rules to which the inherited property is ſubject; (whence it is that a courſe of abſtinence is enjoined upon an heir, with regard to an inherited female ſlave,—and likewiſe, that whatever a *poor* inheritee may have received by way of charity is lawful to his rich heir;) and the right of an heir being inchoate and extant *de novo*, it is indiſpenſable, in ſuch caſe, that the witneſſes bear teſtimony to the ſhifting of the right from the inheritee to the heir,—in other words, that they atteſt the inheritee to have died, and to have left the article in queſtion as an inheritance to his heirs.—They deem it ſufficient, however, in order to prove the ſhifting of the right of property, that witneſſes atteſt that "the thing in queſtion was the property of the inheritee at *the period of his death*;" for then the ſhifting is eſtabliſhed from neceſſity;—and in the ſame manner, it ſuffices if they atteſt that "it was in the *keeping* and *poſſeſſion* of the inheritee at the time of his death;" for although the poſſeſſion of an article may have been in virtue of a depoſit, or of uſurpation, yet the poſſeſſion at death, in either caſe, is in fact a poſſeſſion in virtue of the right, becauſe of the obligation of reſponſibility which then takes place:—in a caſe of uſurpation evidently; and alſo in a caſe of *depoſit* *, becauſe of the death of the truſtee without any explanation;—in other words, if a truſtee ſhould die, without explaining that a particular thing in his poſſeſſion is the depoſit of a particular perſon, it occaſions reſponſibility, becauſe the truſtee, in dying without explaining the caſe, was moſt certainly guilty of a want of care of the depoſit; and a want of care of a depoſit is a tranſgreſſion with reſpect to the depoſit, which

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induces reſponſibility.—Evidence, therefore, of a thing being in the poſſeſſion of a certain perſon at his death, is equivalent to evidence of its being his property.

A recover an article in poſſeſſion of another by *property* of his inheritee, or a *loan* or *depoſit* from him.

Having thus explained the tenets of each of our doctors upon this ſubject, it follows that if witneſſes were to give evidence that a particular houſe was in the poſſeſſion of a certain man at his death, the evidence ſo given muſt be admitted with reſpect to the claimant being the heir of the deceaſed. In the ſame manner alſo, the teſtimony of witneſſes muſt be admitted, where a perſon adduces evidence to prove that a particular houſe, in the poſſeſſion of a certain perſon, was the property of his father, and that his father had lent it, or had delivered it in depoſit to the perſon then poſſeſſing it. In this caſe, therefore, the ſaid perſon is entitled to take the houſe from the preſent occupier, without being required to prove, by witneſſes, that his father had died, and that the ſaid houſe had been left to him in inheritance.—This, according to the tenets of *Aboo Yooſaf*, is evident:—and ſo alſo according to the tenets of *Haneefa* and *Mohammed*; becauſe in the caſe in queſtion it has been ſhewn, by the teſtimony of witneſſes, that the father was in poſſeſſion at the time of his death, inaſmuch as the poſſeſſion of a borrower or truſtee is equivalent to *his own* poſſeſſion; and on this account there is no neceſſity for proving the ſhifting of the property to the heir, ſince that is a conſequence of the proof of the poſſeſſion, as has been already explained.—It is to be obſerved that the law is the ſame where, under theſe circumſtances, the claimant aſſerts the poſſeſſion of the other to have been in virtue of a leaſe; becauſe the poſſeſſion of a leſſee is equivalent to the poſſeſſion of the leſſor.

The right to an article is not eſtabliſhed by evidence to the *former* poſſeſſion of it.

If a perſon claim a right of property to a houſe in the poſſeſſion of another, and the teſtimony of the witneſſes produced by him ſhould run in this manner, "we teſtify that the ſaid houſe was in the poſſeſſion of the claimant *one month ago*,"—ſuch evidence muſt not be admitted.—This is the doctrine of the *Záhir Rawáyet.*—It is related as an opinion of *Aboo Yooſaf*, that the evidence, in this caſe, is admiſſible; becauſe *poſſeſſion* is an object in the ſame manner as *property*; and as the teſtimony of the witneſſes would have been accepted, in caſe they had ſaid that the houſe in queſtion was the *property* of the claimant one month ago, it follows that it muſt be admitted in this caſe alſo.—Beſides, if the witneſſes had depoſed that the other had taken the houſe from the hands or poſſeſſion of the claimant, their evidence would have been admitted, and the claimant would, in conſequence, have been put in poſſeſſion of the houſe. The doctrine of the *Záhir Rawáyet*, in this particular, has been adopted by *Haneefa* and *Mohammed:* and the arguments in ſupport of it are twofold.—FIRST, the ſeizin of the preſent poſſeſſor is actually ſeen with the eye; whereas that of the claimant, which formerly exiſted, is only heard from the tongue of the witneſſes; and knowledge from *hearſay* can never be put in competition with that from actual ſight.—SECONDLY, the evidence, in this caſe, relates to a matter of uncertainty; ſince the former ſeizin of the claimant, not being definitely known, admits of three ſuppoſitions, as it may have exiſted in virtue either of right of property, of depoſit, or of uſurpation;—and where the point is of ſo uncertain a nature, it is impoſſible to paſs a decree upon the poſſeſſion.—It is otherwiſe where the witneſſes atteſt the right of property, as that admits not of various ſuppoſitions;—or, where they atteſt that the houſe had been taken from the claimant; becauſe this is a matter of certainty, of which the law is known, namely, the obligation of reſtitution, or of replacing the thing, as it formerly ſtood, in the poſſeſſion of the claimant.

unleſs the defendant acknowledge

IF the poſſeſſor of the houſe ſhould himſelf acknowledge the former poſſeſſion of the claimant, in that caſe a decree muſt paſs for reſtoring claimant to his poſſeſſion; for the uncertainty with regard to the ſubject of an acknowledgment is no bar to the validity of the acknowledgment itſelf.

IF two perſons atteſt the acknowledgment of the defendant, that "the thing in his poſſeſſion had formerly been in the poſſeſſion of the "claimant," the article in queſtion muſt in that caſe be reſtored to the claimant; becauſe, although the ſubject of the acknowledgment be a matter involved in uncertainty, yet the evidence here relates, not to it, but to the acknowledgment itſelf, which is a matter of certainty;—and the uncertainty in the ſubject of it is no bar to the decree of the *Kâzee*, ſince he may afterwards deſire the acknowledger to explain the nature of the uncertainty.

or two witneſſes atteſt his having

CHAP. V.

Of the Atteſtation of Evidence.

N atteſtation of evidence is admiſſible in all ſuch rights as do not drop in conſequence of a doubt; becauſe there is a neceſſity for this, ſince it may happen that a witneſs, from various cauſes, (ſuch as *ſickneſs*,) may not be able to give his evidence in perſon; whence, if an atteſtation of his evidence were not admiſſible, the rights of mankind would often be deſtroyed. There is, however, a degree of doubt attending it; becauſe the *ſecondary* witneſs, in ſuch caſe, is merely a ſubſtitute for the *primary* witneſs;—and if there be *many* gradations between him and the primary, the ſuſpicion of falſehood becomes ſtill ſtronger.—There is, moreover, a poſſibility of avoiding this expedient, by deſiring the party to produce, independant of the witneſs whoſe attendance is impracticable, ſome other who is alſo a primary

Atteſtation of evidence is admitted in all matters not liable to be aff witneſs.—An atteſtation of evidence, therefore, is never admitted where it tends to eſtabliſh a matter which is repelled by the exiſtence of a doubt, ſuch as *puniſhment* or *retaliation*.

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The atteſtation of two men with regard to the evidence of two others is valid. *Shafeï* maintains that the evidence of four men is neceſſary to authenticate that of two men; becauſe, in his opinion, two ſecondary witneſſes are equivalent to one principal, in the ſame manner as two women are equivalent to one man. The arguments of our doctors in ſupport of their doctrine upon this point, are twofold.—First, *Alee* has declared that an atteſtation of the evidence of one man is not admiſſible unleſs atteſted by two.—Secondly, the ſtating the evidence of a principal or original witneſs is included in the number of rights. If, therefore, two men teſtify to the evidence of a principal witneſs, and afterwards teſtify to the evidence of *another* principal witneſs, both evidences are valid; nor is it required that the evidence of each principal witneſs ſhould be teſtified by two *ſeparate* ſecondary witneſſes.

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tively.

The atteſtation of one perſon to the evidence of one witneſs is not admiſſible, becauſe of the opinion of *Alee*, as before quoted.—*Mâlik* admits the atteſtation of one perſon to the evidence of one witneſs.—The precept of *Alee*, however, is in proof againſt him.—Beſides, the evidence of one principal witneſs is included amongſt the number of rights, and therefore requires to be proved by two witneſſes.

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of his teſti-
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It is requiſite that the principal witneſs deſire the ſecondary to bear teſtimony to his evidence, after the following manner,—"Bear "teſtimony to my evidence, which is, that A. the ſon of B. has made acknowledgment before me to a particular effect, and has deſired "me to atteſt the ſaid acknowledgment."—The reaſon of this is that the ſecondary witneſs is a deputy of the principal, and it is therefore neceſſary that he appoint him his agent, and deſire him to bear evidence in the manner above related.—It is alſo requiſite that the principal give his evidence to the ſecondary, in the ſame manner as he would have done in the aſſembly of the *Kâzee*, in order that he [the ſecondary] may report the ſame literally, in that aſſembly.—It is to be obſerved, however, that if the principal ſhould not mention that "A. "the ſon of B. had called him to witneſs his acknowledgment," ſtill his atteſtation is valid; becauſe whoever hears another make an acknowledgment may lawfully give evidence of the ſame, although the acknowledger ſhould not have deſired him to bear teſtimony.

atteſting witneſs.

Form of an atteſtation.

IT is requiſite that a ſecondary witneſs deliver his teſtimony in the following manner:—"*Zeyd* has called upon me to atteſt his evidence "that *Omar* has made an acknowledgment before him to a particular "effect, and that he had deſired him to bear teſtimony to his evi- "dence of the ſaid acknowledgment."—All this is required, becauſe it is neceſſary that a ſecondary witneſs recite the ſubſtance of the evidence of the principal, and ſpecify that he had called upon him to bear teſtimony to it.

A perſon can- another, unleſs that other deſire him ſo to do.

IF *Omar* hear *Zeyd* aſſert that a particular perſon had deſired him to bear teſtimony to ſome circumſtance, it is not in that caſe lawful for *Omar* to atteſt the ſaid evidence of *Zeyd*, unleſs *Zeyd* ſhould have particularly called upon him to atteſt the ſame; becauſe, in the atteſtation of evidence, that of having been *called upon* to atteſt it is a neceſſary condition. This is according to all our doctors:—according to *Mohammed*, becauſe, in his opinion, the decree of the *Kâzee* paſſes on the ſtrength of *both* evidences; that is, of the principal and the ſecondary; and alſo becauſe both of them are liable, in an equal degree, to the penalty in caſe of a receſſion from their evidence:—and according to *Haneefa* and *Aboo Yooſaf*, becauſe, in their opinion, a repetition of the evidence of the principal witneſs before the *Kâzee* is neceſſary for the eſtabliſhment of proof; and therefore the circumſtance which eſtabliſhes the proof ought to be explained.

Atteſtation is admitted only in caſe of the death, abſence, (at a diſtant place) or ſickneſs of the primary witneſs.

The atteſtation of evidence is not admiſſible excepting where the principal witneſſes have died, or have departed to a diſtance of three days journey or upwards; or are ſo ſick as to be unable to attend at the aſſembly of the *Kázee*.—The reaſon of this is that the atteſtation of evidence is admiſſible only from neceſſity; and this neceſſity exiſts only where the principal witneſſes are unable to give their teſtimony perſonally, which inability exiſts in all theſe caſes.—It is to be obſerved, that, in caſe of the abſence of the principal witneſſes, the diſtance muſt be eſtimated by the time requiſite to travel it; becauſe the incapability of appearing to give evidence is founded on the diſtance, which the LAW eſtimates from the length of time. It is related, as an opinion of *Aboo Yooſaf*, that if the abſent perſon be at a place ſo ſituated as that, having occaſion to appear in the aſſembly of the *Kázee* in the morning, he could not return to his family that day, in that caſe it is lawful to accept, for the preſervation of the rights of mankind, an atteſtation of his evidence. Lawyers, however, remark that the former doctrine is the moſt authentic, as in this latter caſe there is no great inconveniency; and *Aboo Leys* has alſo given this expoſition upon the point.

The *atteſting* witneſſes may appear as *purgators* on behalf of the *primary* witneſſes;

The juſtification of the original witneſſes by the ſecondary is admitted, becauſe they are capable of being purgators.—In the ſame manner alſo, the juſtification of one witneſs by another witneſs is valid, for the like reaſon; and alſo becauſe the effect of it is advantageous to him, ſince the *Kázee* will in conſequence of it paſs a decree. It is likewiſe to be obſerved, that this degree of advantage does not ſubject a juſt man to any degree of ſuſpicion; in the ſame manner as he lies not under any ſuſpicion from the delivery of his own evidence. A juſt man indeed cannot poſſibly lie under ſuſpicion from his juſtification of another witneſs, becauſe his teſtimony is credible in itſelf, although that of the other be rejected.

but their not doing ſo does not affect the evidence which they atteſt.

IF ſecondary witneſſes remain ſilent with reſpect to the juſtification of the principal witneſſes, it is valid; that is to ſay, the teſtimony of the principal witneſſes, as recited by them, muſt be admitted; and the *Kâzee* muſt ſcrutinize into their characters from others. This is according to *Aboo Yooſaf*. *Mohammed* has ſaid that in this caſe the original evidence, as recited by the ſecondary witneſſes, muſt not be admitted; becauſe the validity of evidence is founded entirely on the probity of the witneſſes; and it conſequently follows, that unleſs the ſecondary witneſſes explain the probity of the principals, their teſtimony repeated by them cannot be received as valid evidence. The reaſoning of *Aboo Yooſaf* is, that the buſineſs of ſecondary witneſſes is merely to recite the evidence of the principals, and not to exhibit a juſtification of them, ſince it may often happen that they are ignorant of the probity of the principals. Beſides, after they have recited their evidence, it is the buſineſs of the *Kâzee* to examine into their probity, in the ſame manner as if they were actually preſent.

The denial of the primary witneſſes annuls the atteſtation.

IF the principals *deny* the evidence recited on their part by the ſecondaries, the evidence of the ſecondaries muſt not be admitted, becauſe of the want of proof, from the contradiction which ſubſiſts between them and the principals.

If the atteſting witneſſes have not a clear perſonal knowledge of th [illegible] proved by [illegible]

IF two men bear teſtimony to the evidence of two others, to this effect, that "a certain woman, the daughter of a native of *Samarcand*, "has made an acknowledgment of one thouſand *dirms* in favour of *Zeyd*,"—and theſe ſecondary witneſſes further declare, that the principals had informed them, that they knew the perſon of the woman,—and the plaintiff produce a woman, and the ſecondary witneſſes declare that "they do not know whether ſhe is the woman in "queſtion or not,"—in that caſe the plaintiff muſt be deſired to produce two witneſſes to teſtify the woman's identity; ſo dence of the witneſſes tends to prove the claim upon an perſon, whereas the plaintiff claims his right from a perſon ſpecific and preſent; and hence a doubt ariſes, to remove which it is requiſite to aſcertain the perſon.—

and ſo alſo, with reſpect to the limits of the claim.

Analogous to this is a caſe where two witneſſes bear teſtimony to the evidence of two others, that "a "certain perſon ſold a piece of ground circumſcribed by particular "boundaries, and the price is due by the purchaſer;"—for here it is requiſite to produce two other witneſſes to atteſt that the ſaid ground, circumſcribed by the ſaid boundaries, had been delivered over to the purchaſer, who is the defendant;—and in the ſame manner alſo, it is requiſite to produce two other witneſſes, in caſe the defendant deny that the boundaries of the ground he had purchaſed are the ſame with thoſe deſcribed in the evidence of the witneſſes; to the end that theſe additional witneſſes may bear evidence that thoſe boundaries were the ſame with thoſe of the ground in the poſſeſſion of the purchaſer.—

The identity of a perſon affected by a *Kâzee*'s letter muſt be proved.

The law is exactly the ſame with regard to the letters of one *Kâzee* to another;—as where one *Kâzee* writes to another, that "two witneſſes "have given evidence that a debt of one thouſand *dirms* is due to a "certain perſon, the ſon of a certain perſon, of a certain family, by "the daughter of a certain perſon of a certain family, and that he "muſt paſs a decree for the ſaid daughter's payment of the ſaid ſum;" for here, if the plaintiff, after delivering the letter to the *Kâzee* to whom it is addreſſed, produce a woman, the *Kâzee*, before he paſſes the decree, muſt deſire him to bring two witneſſes to atteſt that ſhe is the ſame woman as deſcribed in the letter of the other *Kâzee*.—It is to be obſerved that if, in either of theſe caſes, (namely, atteſtation of evidence, or of the letters of one *Kâzee* to another,) in the ſpecification of the family of the woman, the witneſſes make uſe of the term *Tameemia*, it is not valid; it being neceſſary to ſpecify ſome nearer and more particular branch to which the woman is related, in order that a particular knowledge may be acquired, which cannot be done in caſe of the ſpecification of ſo general a branch as that of *Tameem*, whoſe deſcendants are innumerable.—It is the opinion of ſome that the word *Farghaniá* implies a general, and *Auzchàndiá* a particular family.—Some, alſo, think that the words *Samarcàndia* or *Bokhária* are general; and ſome have ſaid that the reference to a ſmall lane is particular, and to a ſtreet or city general.—It is to be obſerved that, according to the *Zâhir Rawâyet*, the opinion of *Haneefa* and *Mohammed* (in oppoſition to that of *Aboo Yooſaf*) is that deſcription is rendered complete by the ſpecification of the *grandfather*; but that the ſpecification of the particular family (which is termed *Fakhiz**) is equivalent to the mention of the grandfather; ſince it is the name of a *diſtant* progenitor, which is equivalent to a *nearer* one.

SECTION.

A falſe witneſs muſt be ſtigmatized.

HANEEFA is of opinion that a falſe witneſs muſt be ſtigmatized†, but not chaſtized with blows. The two diſciples are of opinion that he muſt be ſcourged and confined; and this is alſo the opinion of *Shafeï*. The arguments of the two diſciples upon this point are twofold.—FIRST, It is related of *Omar*, that he cauſed a falſe witneſs to be ſcourged with forty ſtripes, and to have his face blackened with the ſoot of a pot. SECONDLY, falſe teſtimony is a great crime, of which the evil reſults to others; and as no ſtated puniſhment has been ordained for it in the LAW, it muſt therefore be puniſhed by *Tazeer*, or diſcretionary correction. The arguments of *Haneefa* are alſo twofold.

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* To underſtand the whole of this paſſage, it is proper to remark that of tribes among the *Arabians* there are ſix degrees, I. *Shooàb*, II. *Kabeela*, III. *Fazeela*, IV. *Omàra*. V. *Batn*, VI. *Fakhiz*;—in which laſt are included the neareſt kindred. (*Richardſon's Dictionary.*)

† Arab. *Yewhàſhiro*, from *taſh-heer*, which literally ſignifies *expoſing in public*; a mode of puniſhment ſomewhat ſimilar to the *ſtocks* or *pillory*.

fold.—**First**, *Shirreeh* ſtigmatized a falſe witneſs, but did not ſcourge him. **Secondly**, prevention of the crime in future may be effected by ſtigmatizing, and it ought therefore to be adopted as ſufficient; for were beating or ſcourging enjoined in ſuch caſes, it might operate to the concealment of the crime, and the conſequent deſtruction of the rights of others;—in other words, as being a grievous puniſhment, the fear of it might deter falſe witneſſes from a confeſſion of their falſehood. With regard to the relation concerning *Omar*, it evidently alludes to the infliction of puniſhment on a criminal, as appears by the number of ſtripes, (namely forty,) and the blackening of the countenance.

Mode of ſtigmatizing a falſe witneſs.

The mode of ſtigmatizing a falſe witneſs, as preſcribed by *Shirreeh*, is this.—If the witneſs be a ſojourner in any public ſtreet or market-place, let him be ſent to that ſtreet or market-place; or, if otherwiſe, let him be ſent to his own tribe or kindred, after the evening prayers, (as they are generally aſſembled in greater numbers at that time than any other;)—and let the ſtigmatizer inform the people that "*Kázee Shirreeh* ſalutes them, and informs them, that he "has detected this perſon in giving falſe evidence; that they muſt "therefore beware of him themſelves, and likewiſe deſire others to "beware of him." *Shimſal Ayma* has ſaid that a falſe witneſs ought alſo to be *ſtigmatized*, according to the two diſciples; and that the degree of correction and impriſonment ought (according to them) to be left to the diſcretion of the *Kázee*.—(The nature of diſcretionary correction has been already explained under the head of *Puniſhments*.) It is related in the *Jama Sagheer* that if two witneſſes confeſs that they have given falſe evidence, they muſt not be ſcourged. The two diſciples maintain that they are to be ſcourged at the diſcretion of the *Kázee*.

HEDÀYA.

BOOK XXII.

Of RETRACTATION *of* EVIDENCE.

Evidence retracted *before* a decree, is void:

If witneſſes retract their teſtimony prior to the *Kâzee* paſſing any decree, it becomes void; (that is to ſay, the *Kâzee* muſt not paſs any decree upon it;) for the right of the claimant cannot be eſtabliſhed but by the decree of the *Kâzee*; and the *Kâzee* cannot paſs a decree upon contradictory teſtimony:—and in this caſe the witneſſes are not liable to make atonement, ſince they have not occaſioned any injury to either of the parties. If, on the contrary, the *Kâzee* paſs a decree, and the witneſſes afterwards retract their teſtimony, the decree is not thereby rendered void; becauſe, although the firſt allegation on which the decree paſſed be contradicted by the latter, and although the firſt and

but not if retracted after a decree has paſſed.

and the laſt in point of credit ſtand upon an equal footing, yet the firſt, becauſe of the ſentence of the *Kâzee* having paſſed in conformity to it, acquires a ſuperiority which prevents its annulment.—In this caſe, however, the witneſſes are bound to atone for the injury they may have occaſioned by their falſe teſtimony; for they themſelves acknowledge a thing which is the cauſe of reſponſibility; and contradiction is no bar to the validity of acknowledgment, as ſhall be hereafter explained.

The retractation muſt be made in open court.

THE retractation of evidence is not valid, unleſs it be made in the preſence of the *Kâzee*; becauſe, being a deſtruction of evidence, it muſt conſequently be reſtricted to that place which is particularly appointed for the reception of evidence,—namely the aſſembly of the *Kâzee*,—(that is to ſay, of any *Kâzee* whatever.)—Beſides, retractation of falſe evidence reſembles repentance of a crime; and repentance of a crime, if committed privately, muſt be performed privately, and if committed openly, muſt be performed openly.—As, therefore, retractation of evidence is not valid, unleſs made in the aſſembly of the *Kâzee*, it follows that if the defendant ſhould aver that the witneſſes had retracted their teſtimony ſome where out of the aſſembly of the *Kâzee*, and ſhould either require that an oath to this effect be adminiſtered to them in the aſſembly of the *Kâzee*, or offer to produce witneſſes there to prove his aſſertion, yet neither would the oath be adminiſtered to thoſe witneſſes, nor would the evidence he offers to produce be accepted, ſince the plea on which he proceeds (namely, an *invalid* retractation) is of no effect. If, on the contrary, his plea be of an effectual nature, (as if he ſhould aſſert that the witneſſes had retracted their teſtimony before a certain *Kâzee*, who had in conſequence paſſed a decree for their making reparation,) the evidence he offers muſt be admitted, becauſe he in this inſtance grounds his plea upon a valid retractation.

ten women for an half; becauſe, although they greatly exceed in of number, yet they are in fact only equivalent to one man, as their evidence is not admiſſible unleſs it be in conjunction with that of a man. *Haneefa*, on the other hand, argues that the evidence of every two women is equivalent to that of one man; becauſe the prophet, on account of the weakneſs of their underſtanding, has ordained that the evidence of two women ſhall be equivalent to that of one man. Hence, in the caſe in queſtion, it is the ſame as if ſix men had given evidence and had afterwards retracted it.—If the ten women retract, and not the *man*, they are reſponſible for an half of the right, according to all our doctors, in conformity with the rule before-

If two men and one woman give evidence in a matter of property, all of them afterwards retract, the whole of the reſponſibility reſts on the two men, and none on the woman, becauſe one woman is no more than half of a witneſs, whence the law regards not her in this caſe, inaſmuch as no effect reſults from the mere part of a cauſe.

If two witneſſes give evidence concerning a woman, of her being married on a *Mihr Miſl*, or *proper* dower[*], and afterwards retract their teſtimony, they are not bound to make any compenſation[†]; and ſo likewiſe, if they teſtify to any thing *ſhort* of the proper dower; becauſe the advantage to be derived from the woman's perſon is not an article of value where it is loſt to her by falſe evidence; for compenſation, in caſe of the deſtruction of any thing, implies the return of a ſimilar; and there is no ſimilarity between ſubſtantial property and the enjoyment.

marriage and *proper* dower does not ſubject the retractors to any reſponſibility.

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[*] This caſe ſuppoſes that the woman claims a *ſtipulated* dower, *greater* than her proper dower, and that the huſband endeavours to reſiſt her claim by evidence.

[†] That is, they are not to compenſate for the difference.

If two witneſſes give evidence concerning a man, of his married a woman on a proper dower, and afterwards retract the ſame, ſtill they are not bound to make any compenſation, although by their teſtimony they have deſtroyed the property of that man; becauſe the deſtruction in this inſtance is attended with an equivalent, inaſmuch as the connubial enjoyment is conſidered as an article of value, whenever it becomes the *right* of any one; and deſtruction attended with a conſideration or equivalent, is the ſame, in effect, as no deſtruction. The ground of this is that reſponſibility is founded upon ſimilarity. Now there is no ſimilarity between deſtruction with an exchange and deſtruction without an exchange. If, therefore, in the caſe in queſtion, a compenſation were taken from the witneſſes, it would be a deſtruction of their property without any thing in return.—If, however, the witneſſes were to teſtify to any amount beyond the proper dower, and afterwards retract, they are in that caſe reſponſible for the exceſs, as having deſtroyed that much without any conſideration in return.

The retractation of evidence to a ſale does not occaſion reſponſibility, unleſs a price had been at-

If two witneſſes bear evidence to a ſale for a price tantamount to, or greater than, the value of the thing ſold, and afterwards retract, they are not in that caſe liable to any compenſation; ſince deſtruction attended with an equivalent is, in effect, *no* deſtruction.—If, on the contrary, they ſhould give evidence of the ſale for a price *leſs* than the value, they are in that caſe reſponſible for the deficiency of value, becauſe, in that amount, they have occaſioned a deſtruction without any equivalent. The law here applies equally to ſale with or without an option to the ſeller; becauſe, in the caſe of an option, the cauſe of right of property is the original *ſale*, and not the determination of the *option*.—The effect, therefore, is referred to the *ſale*, upon the determination of the option; and hence the deſtruction is referred to the evidence of the ſale.

If two witneſſes give evidence of a man having divorced his wife prior to conſummation, and afterwards retract, they are in that caſe reſponſible for a moiety of the dower; becauſe they have eſtabliſhed upon that man a thing which ſtood within the poſſibility of dropping, (in other words, which might perhaps have been altogether cancelled, by the wife apoſtatizing from the faith, or admitting the ſon of her huſband to carnal connexion *;)—and alſo, becauſe ſeparation prior to the conſummation is equivalent to an annulment of the marriage, and therefore annuls the whole of the dower, as has been already explained †; but afterwards the half of the dower is eſtabliſhed *de novo*, in the manner of a *Matát* or preſent ‡, and hence the ſaid half is rendered due by the teſtimony of the witneſſes.

tracting their evidence to

the

If witneſſes atteſt that a certain perſon had emancipated his ſlave, and afterwards retract their teſtimony, they are in that caſe reſponſible to the perſon in queſtion for the value of the ſaid ſlave, becauſe of their having deſtroyed his property in the ſlave without any equivalent in return.—The right of *Willa*, moreover, with reſpect to the ſlave, reſts with that perſon and with the witneſſes; becauſe as the emancipation of the ſlave is not, on account of their reſponſibility, aſcribed to their teſtimony, it follows that the *Willa* does not go to them.

Witneſſes retracting their evidence to manumiſſion are liable for the value of the ſlave.

If two witneſſes bear evidence againſt a perſon, in a caſe of retaliation for murder, and then retract their teſtimony after the perſon has been put to death, they are in that caſe bound to pay a *Deeyat*, or fine of blood, but are not to ſuffer death by way of retaliation. *Shafeï* maintains that they are to ſuffer death, ſince they were the efficient cauſe of death, inaſmuch as the retaliation was executed on the ſtrength of their evidence; and they therefore reſemble a *Mòkrih*, or *compeller*, (in other words, they *compel* the commiſſion of murder;)—nay, they are ſtill more criminal than a *Mòkrih*, inaſmuch as the avenger of blood

Witneſſes retracting in a caſe of retaliation are liable to a *fine*, but not to *retaliation*.

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* Vol. I. p. 182.

† Vol. I. p. 145.

‡ Vol. I. p. 125.

in a caſe of murder, is aided in bringing the murderer to juſtice; whereas a perſon under compulſion is prohibited, by the LAW, from putting to death *. The reaſoning of our doctors is, that the witneſſes, in this caſe, cannot be conſidered either as actual perpetrators, or as inſtrumental cauſes of the bloodſhed; for nothing can be conſidered as a cauſe except ſuch a thing as preſſes upon, and joins to, the agent; and the teſtimony of the witneſſes cannot be conſidered in this light, ſince, notwithſtanding they furniſh legal grounds for the retaliation, yet pardon and forgiveneſs being benevolent acts, the probable conſequence is that the avenger of blood will pardon the perſon againſt whom they bore evidence. It is otherwiſe in a caſe of *compulſion*; for the perſon compelled is induced to execute the murder with a view to ſave his own life, which the compeller threatens to take from him in caſe of his refuſal; whereas, in the caſe in queſtion, there is no compulſion on the avenger of blood to execute the retaliation; on the contrary, he is at free liberty either to pardon the other, or to execute the retaliation; and where a man acts from free liberty, and not from any neceſſity, the cauſe of his actions cannot be aſcribed to the witneſſes: at leaſt, it muſt be allowed that there is a *doubt* with reſpect to their being the cauſe; and the exiſtence of a doubt is preventive of retaliation. The *Deeyat*, or fine of blood, however, takes place; becauſe that is a matter of property, and, as ſuch, may be eſtabliſhed, notwithſtanding any *doubt* which may happen to attend it.

Secondary witneſſes retracting their atteſtation are reſponſible

IF ſecondary witneſſes † retract their evidence, they are reſponſible; ſince the deſtruction of the defendant's property is referred to them, becauſe of their giving evidence in the aſſembly

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* *Compulſion.*

† Meaning, witneſſes who atteſt the evidence of other witneſſes. (See Chap. V. of the preceding book.)

If, on the other hand, the *primary* witneſſes retract, alleging that they had not authorized the ſecondary witneſſes to atteſt their evidence, they are not reſponſible, ſince they deny the evidence which occaſioned the deſtruction of the property of the defendant. In this caſe, moreover, the decree of the *Kâzee*, occaſioned by this teſtimony, is not rendered null, ſince the denial of the primary witneſſes is ſuſceptible of doubt, (that is, it may either be falſe or true,) and the decree of the *Kâzee* cannot be reverſed by a dubious circumſtance; in the ſame manner as it cannot be reverſed by the retractation of evidence, after it has paſſed on the ſtrength of that evidence.—It is otherwiſe where the primary witneſſes make the denial *prior* to the paſſing of a decree; becauſe in that caſe the *Kâzee* would not paſs the decree on the ſtrength of the evidence of the ſecondary witneſſes.—If, however, the primary witneſſes avow that they had authorized the evidence of the ſecondary witneſſes, but that they had committed an error in ſo doing, they are in that caſe reſponſible for the loſs that may have been occaſioned.—This is according to *Mohammed.*—The two elders are of opinion that, even in this caſe, the primary witneſſes do not become reſponſible; ſince the decree of the *Kâzee* paſſed upon the evidence of the ſecondary witneſſes, from the neceſſity under which the *Kâzee* lies of proceeding on the proof before him, which in this caſe is the evidence of the ſecondary witneſſes.—The reaſoning of *Mohammed* is that the ſecondary witneſſes do only repeat the evidence of the principals; and hence it becomes in effect the ſame as if the principal witneſſes were themſelves preſent.

for the damage:—but
the *primary*

ſible if
retract
avow.

If both the primary and the ſecondary witneſſes retract their evidence, the two *Elders* are in that caſe of opinion that compenſation is due only by the *ſecondary* witneſſes, becauſe of the decree having paſſed on their evidence. *Mohammed*, on the contrary, is of opinion that the defendant has the option of taking the compenſation either from the principal or the ſecondary witneſſes; becauſe (according to the doctrine of the two diſciples) the decree paſſed on the evidence of the

Caſe of retractation by
both primary

END OF THE SECOND VOLUME.

ERRATA in the SECOND VOLUME.

Page 12, line 17, *for* " of bleſſings," *r.* " of *the* bleſſings."
26, (note,) — *friceus*, r. *fricens*.
31, (note,) — *Copulata*, r. *Copulator*.
36, line 18, — ſuſpenſion, *r.* ſuſpicion.
48, (note,) — *Mozâkkee*, r. *Moozkee*.
50, line 5, — ſentenced, *r.* ſentence.

83, —— 8, — " or (larciny, namely,"— *r.* " or Larciny, (namely,"-
84, —— 20, — *airms*, r. *dirms*.
—, —— 30, — corrob*e*ration, *r.* corrob*o*ration.
- 3, — inclo*ſ*ed, *r.* incl*ud*ed.
- 6, — off, *r.* of.
- 1, — *Imâam*, r. *Imâm*.
- 1, — *Imâam*, r. *Imâm*.
- 27, — obtained, *r.* obtains.
236, - 12, — perſon, *r.* power.
- 6, — " manner in the," *r.* " manner *as* in the" —
435, —— 29, — leſſer, *r.* leſſor.
451, —— 14, — wh*i*ther, *r.* wh*e*ther.
452, —— 2, — ſtrangers, *r.* ſtranger.
484, —— 19, in " form *of* the price," dele *of*.
492, —— 24, — relates, *r.* exiſts.
503, (title Chap. X.) *for* other, *r.* others.
508, —— 13, — fell, *r.* ſell.
541, —— 10, — opinion, *r.* option.
564, (laſt note,) *for* copper, *r.* ſilver.
607, line 23, for *Mabeel*, r. *Mobeel*.
note,) *for* deprav*i*d, *r.* deprav*ed*.